VIII. RESALE

863. Section 251(c)(4) imposes a duty on incumbent LECs to offer certain services for resale at wholesale rates. Specifically, section 251(c)(4) requires an incumbent LEC:

> (A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and
>
> (B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.[2061]

864. The requirement that incumbent LECs offer services at wholesale rates is described in section 252(d)(3), which sets forth the pricing standard that states must use in arbitrating agreements and reviewing rates under BOC statements of generally available terms and conditions:

> [A] State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

Section VIII.A. of this Order discusses the scope of section 251(c)(4). Section VIII.B. addresses the determination of "wholesale rates." Section VIII.C. considers the issue of conditions or limitations on resale under this section, Section VIII.D. discusses the resale obligations under section 251(b)(1), and Section VIII.E. considers the application of access charges in the resale environment.

[2061] 47 U.S.C. § 251(c)(4).

A. Scope of Section 251(c)(4)

1. Background and Comments

865. In the NPRM, we sought comment generally on the scope of section 251(c)(4).[2062] AT&T and MCI request that the Commission adopt a minimum list of services that should be available for resale under section 251(c)(4).[2063] Cable & Wireless, the Telecommunications Resellers Association, and others argue for an expansive definition of "telecommunications services."[2064] For example, MCI argues that we should explicitly identify the following as telecommunications services that must be made available for resale: measured-rate business, flat-rate business, measured-rate residential, flat-rate residential; custom calling features (including all CLASS services); call blocking services; voice messaging; Integrated Services Digital Network (ISDN), Basic Rate Interface (BRI), and Primary Rate Interface (PRI); flat-rated and measured trunk services (including all types of PBX trunks); Automatic Number Identification (ANI) over T-1; data services; promotions, optional calling plans, special pricing plans; calling card, directory services, operator services; intraLATA toll; public access line service; semi-public coin telephone service; foreign exchange services; video dialtone; and Centrex and all feature packages.[2065]

866. Incumbent LECs on the other hand, argue for a much more limited set of services, primarily those generally thought of as basic telephone services.[2066] For example, SBC lists the following as examples of services that should be excluded: billing and collection; enhanced billing products; enhanced white page listings; inside wire; BDS/LAN; customer premises equipment; and information services.[2067]

867. Some commenters argue that parties seeking discounted telecommunications services for their own telephony needs should not be allowed to purchase services at wholesale prices. For example, Roseville Telephone argues that (1) requests for discounted resale services must come from carriers, not from end users; (2) a wholesale customer must resell 95 percent of the services it purchases at wholesale prices to unaffiliated companies; and (3) limits should be placed on how much of what wholesale service is

[2062] NPRM at para. 173.

[2063] AT&T comments at 77 n.113; MCI comments at 84.

[2064] Cable & Wireless comments at 38-39; Telecommunications Resellers Ass'n comments at 18 n.47; AT&T comments at 76-78; MCI comments at 84.

[2065] MCI comments at 84.

[2066] *See, e.g.*, MECA comments at 60; NYNEX comments at 76-7; SBC reply at 13.

[2067] SBC comments at 67-68.

sold to any one subscriber.[2068] Similarly, GTE argues that new entrants must resell service they purchase under section 251(c)(4) and not simply use such services for their own internal or administrative purposes.[2069] Cincinnati Bell requests that we explicitly state that resellers of incumbent LEC service must be telecommunications carriers.[2070] Conversely, AT&T opposes predicating the ability to purchase services at wholesale rates on the percentage of customers that purchase the resold service.[2071]

868. Some parties address the application of section 251(c)(4) to the services incumbent LECs sell to independent public payphone providers. The American Public Communications Council contends that independent public payphone providers are not "telecommunications carriers."[2072] The American Public Communications Council cites the definition in section 3(44) that excludes "aggregators," as defined in section 226[2073] and points out that we have previously found that independent public payphone providers are aggregators insofar as they exercise control over payphones.[2074] Thus, the American Public Communications Council argues, services sold to independent public payphone providers by incumbent LECs would be "telecommunications service[s] that [an incumbent LEC] provides at retail to subscribers who are not telecommunications carriers," thereby making such services subject to section 251(c)(4).[2075] The American Public Communications Council also argues that nothing in section 251 requires an entity purchasing services for resale to be a "telecommunications carrier."[2076] NYNEX argues that independent public payphone providers do not purchase these services for resale, but for their own use.[2077] Additionally, NYNEX argues, independent payphone providers do not interpose themselves between incumbent LECs and their existing retail customers, and thus do not enable incumbent LECs to avoid some

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[2068] Roseville Tel. comments at 3-5.

[2069] GTE comments at 47.

[2070] Cincinnati Bell comments at 31.

[2071] AT&T comments at 80 n.120.

[2072] American Public Communications Council comments at 2-3.

[2073] 47 U.S.C. § 153(44). Section 226(a)(2) defines "aggregator" as "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services. 47 U.S.C. § 226(a)(2).

[2074] American Public Communications Council comments at 2 (citing *Policies and Rules Concerning Operator Service Providers*, *Report and Order*, 6 FCC Rcd 2744 (1991), *recon.* 7 FCC Rcd 3882 (1992)).

[2075] American Public Communications Council at 3.

[2076] *Id.*

[2077] NYNEX reply at 39.

portion of costs they incur in dealing with those customers.[2078] MFS argues that no resale relationship exists between an incumbent LEC and an independent public payphone provider.[2079]

869. Parties dispute whether specially-priced bundles of services must be offered for resale. SNET argues that LECs are not required to resell bundled services, as long as the services are all offered separately. SNET contends that requiring wholesale offerings of bundled services would deter competitive offerings by incumbent LECs.[2080] SBC argues that bundled services are not single services and therefore not subject to the resale provisions of the 1996 Act.[2081] The Telecommunications Resellers Association, TCC, LDDS, and MCI take the opposite position,[2082] noting that bundled items are often sold at prices well below the sum of their stand-alone prices.

870. The Telecommunications Resellers Association and Cable & Wireless argue that, where the incumbent LEC offers services only on a bundled basis, these services should be unbundled and offered separately, at wholesale rates.[2083] AT&T specifically argues that it should be allowed to purchase local exchange service without operator services.[2084] Pacific Telesis, NYNEX, and NCTA argue that incumbent LECs should not be subject to this requirement so long as the services are not offered to retail customers on a stand-alone basis.[2085] Bell Atlantic opposes AT&T's claim that Bell Atlantic should be required to provide local service without operator services for resale.[2086]

2. Discussion

871. Section 251(c)(4)(A) imposes on all incumbent LECs the duty to offer for resale "any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications

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[2078] *Id.*

[2079] MFS reply at 32.

[2080] SNET comments at 34.

[2081] *Id.* at 72-73.

[2082] Telecommunications Resellers Ass'n comments at 18; TCC comments at 44; LDDS comments at 83; MCI comments at 89.

[2083] *See, e.g.*, Telecommunications Resellers Ass'n comments at 19 n.49; Cable & Wireless comments at 48.

[2084] AT&T comments at 81 n.123.

[2085] PacTel comments at 87; NYNEX comments at 73; NCTA comments at 57.

[2086] Bell Atlantic reply at 25.

carriers."[2087] We conclude that an incumbent LEC must establish a wholesale rate for each retail service that: (1) meets the statutory definition of a "telecommunications service;" and (2) is provided at retail to subscribers who are not "telecommunications carriers."[2088] We thus find no statutory basis for limiting the resale duty to basic telephone services, as some suggest.

872. We need not prescribe a minimum list of services that are subject to the resale requirement. State commissions, incumbent LECs, and resellers can determine the services that an incumbent LEC must provide at wholesale rates by examining that LEC's retail tariffs. The 1996 Act does not require an incumbent LEC to make a wholesale offering of any service that the incumbent LEC does not offer to retail customers. State commissions, however, may have the power to require incumbent LECs to offer specific intrastate services.[2089]

873. Exchange access services are not subject to the resale requirements of section 251(c)(4). The vast majority of purchasers of interstate access services are telecommunications carriers, not end users. It is true that incumbent LEC interstate access tariffs do not contain any limitation that prevents end users from buying these services, and that end users do occasionally purchase some access services, including special access,[2090] Feature Group A,[2091] and certain Feature Group D elements for large private networks.[2092] Despite this fact, we conclude that the language and intent of section 251 clearly demonstrates that exchange access services should not be considered services an incumbent LEC "provides at retail to subscribers who are not telecommunications carriers" under section 251(c)(4). We

[2087] 47 U.S.C. § 251(c)(4)(A).

[2088] "Telecommunications service" is defined in section 3(46) to mean "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46) "Telecommunications" is, in turn, defined in section 3(43) as "the transmission, between or among points specified by the user, of information of the user's choosing without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). "Telecommunications carrier" is defined in section 3(44) to mean "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226)." 47 U.S.C. § 153(44).

[2089] *See, e.g.*, Illinois Public Utilities Act, Section 13-505.5.

[2090] End users may purchase special access from incumbent LECs in order to use high volume services offered by IXCs, such as AT&T's Megacom service.

[2091] Feature Group A is similar to a local exchange service, but is used for interstate access. In such circumstances, the end user dials a seven-digit number to reach the LEC's "dial tone office" serving an IXC, where the LEC switches the call to the IXC's POP via a dedicated line-side connection. Feature Group A represents approximately one percent of incumbent LEC transport revenues.

[2092] Feature Group D is the set of elements through which IXCs today almost universally purchase switched access services from incumbent LECs.

note that virtually all commenters in this proceeding agree, or assume without stating, that exchange access services are not subject to the resale requirements of section 251(c)(4).[2093]

874. We find several compelling reasons to conclude that exchange access services should not be subject to resale requirements. First, these services are predominantly offered to, and taken by, IXCs, not end users. Part 69 of our rules defines these charges as "carrier's carrier charges,"[2094] and the specific part 69 rules that describe each interstate switched access element refer to charges assessed on "interexchange carriers" rather than end users.[2095] The mere fact that fundamentally non-retail services are offered pursuant to tariffs that do not restrict their availability, and that a small number of end users do purchase some of these services, does not alter the essential nature of the services. Moreover, because access services are designed for, and sold to, IXCs as an input component to the IXC's own retail services, LECs would not avoid any "retail" costs when offering these services at "wholesale" to those same IXCs. Congress clearly intended section 251(c)(4) to apply to services targeted to end user subscribers, because only those services would involve an appreciable level of avoided costs that could be used to generate a wholesale rate. Furthermore, as explained in the following paragraph, section 251(c)(4) does not entitle subscribers to obtain services at wholesale rates for their own use. Permitting IXCs to purchase access services at wholesale rates for their own use would be inconsistent with this requirement.

875. We conclude that section 251(c)(4) does not require incumbent LECs to make services available for resale at wholesale rates to parties who are not "telecommunications carriers" or who are purchasing service for their own use. The wholesale pricing requirement is intended to facilitate competition on a resale basis. Further, the negotiation process established by Congress for the implementation of section 251 requires incumbent LECs to negotiate agreements, including resale agreements, with "requesting telecommunications carrier or carriers,"[2096] not with end users or other entities. We further discuss the definition of "telecommunications carrier" in Section IX. of the Order.

876. With regard to independent public payphone providers, however, we agree with the American Public Communication Council's argument that such carriers are not "telecommunications carriers" under section 3(44). We therefore also agree with the American Public Communications

[2093] *See, e.g.*, Cincinnati Bell comments at 34; Citizens Utilities comments at 25; NYNEX comments at 35 n.70; Rural Tel. Coalition comments at 20; J. Staurulakis comments at 6; SBC reply at 13; USTA reply at 31; Wisconsin Commission comments at Attachment, pp. 7-8.

[2094] 47 U.S.C. § 69.5(b).

[2095] The one exception, as discussed below, is the SLC, which is assessed on end users regardless of who purchases the access services from the incumbent LEC.

[2096] 47 U.S.C.§ 252(a)(1).

Council's contention that the services independent public payphone providers obtain from incumbent LECs are telecommunications services that incumbent LECs provide "at retail to subscribers who are not telecommunications carriers" and that such services should be available at wholesale rates to telecommunications carriers. Because we conclude that independent public payphone providers are not "telecommunications carriers," however, we conclude that incumbent LECs need not make available service to independent public payphone providers at wholesale rates. This is consistent with our finding that wholesale offerings must be purchased for the purpose of resale by "telecommunications carriers."

877. We conclude that the plain language of the 1996 Act requires that the incumbent LEC make available at wholesale rates retail services that are actually composed of other retail services, *i.e.*, bundled service offerings. Section 251(c)(4) states that the incumbent LEC must offer for resale "any telecommunications service" provided at retail to subscribers who are not telecommunications carriers. The resale provision of the 1996 Act does not contain any language exempting services if those services can be duplicated or approximated by combining other services. On the other hand, section 251(c)(4) does not impose on incumbent LECs the obligation to disaggregate a retail service into more discrete retail services. The 1996 Act merely requires that any retail services offered to customers be made available for resale.

B. Wholesale Pricing

1. Background

878. As discussed above, section 251(c)(4) requires incumbent LECs to offer at "wholesale rates" any telecommunications services that the carrier provides at retail to subscribers who are not telecommunications carriers. Section 252(d)(3) establishes the standard that states must use in determining wholesale rates in arbitrations or in reviewing wholesale rates under BOC statements of generally available terms and conditions. Specifically, section 252(d)(3) provides that wholesale rates shall be set "on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier."[2097]

879. In the NPRM, we generally sought comment on the meaning of the term "wholesale rates" in section 251(c)(4).[2098] We asked if we could and should establish principles for the states to apply in order to determine wholesale prices in an expeditious and consistent manner. We also sought comment on whether we should issue rules for states to apply in determining avoided costs. We stated that we could, for example, determine that states are permitted under the 1996 Act to direct incumbent LECs to quantify

[2097] 47 U.S.C. § 252(d)(3).

[2098] NPRM at para. 179.

their costs for any marketing, billing, collection, and similar activities that are associated with offering retail, but not wholesale, services.[2099] We also sought comment on whether avoided costs should include a share of common costs and general overhead or "markup" assigned to such costs. LECs would then reduce retail rates by this amount, offset by any portion of expenses that they incur in the provision of wholesale rates.[2100] We noted that this approach appeared to be consistent with the 1996 Act, but would create certain administrative difficulties because all of the information regarding costs is under the control of the incumbent LECs.[2101] We also asked for comment on several alternative approaches. For example, we asked whether we could establish a uniform set of presumptions regarding avoided costs that states could adopt and that would apply in the absence of a quantification of such costs by incumbent LECs.[2102] Additionally, we asked whether we should identify specific accounts or portions of accounts in the Commission's Uniform System of Accounts ("USOA")[2103] that the states should include as avoided costs.[2104] We also requested comment on whether we should establish rules that allocate avoided costs across services.[2105] We asked whether incumbent LECs should be allowed, or required, to vary the percentage wholesale discounts across different services based on the degree the avoided costs relate to those services.[2106] Finally, we asked whether we should adopt a uniform percentage discount off of the retail rate of each service.[2107]

2. Comments

880. Most commenters other than incumbent LECs and some states advocate establishment of national pricing rules regarding arbitrated rates for competitors' acquisition of services for resale under

[2099] *Id*. at para. 180.

[2100] *Id*.

[2101] *Id*.

[2102] *Id*. at para. 181.

[2103] 47 C.F.R. § 32.

[2104] NPRM at para. 181.

[2105] *Id*. at para. 182.

[2106] *Id*.

[2107] *Id*.

section 251(c)(4).[2108] Incumbent LECs and state commissions argue that we do not have the authority to establish such rules and, even assuming such authority exists, we should not exercise it.[2109] Bay Springs, *et al.*, GVNW, and the Rural Telephone Coalition argue that establishing national wholesale pricing rules would insufficiently recognize differences in LECs' operations, resulting in inadequate compensation for small incumbent LECs.[2110]

881. Many commenters preface their arguments concerning wholesale discounts calculation with a general discussion of the role of resale in creating a competitive local exchange market. IXCs and resellers argue that resale is the quickest method of developing ubiquitous competition and therefore encourage the Commission to adopt of national rules that would result in substantial wholesale discounts.[2111] AT&T argues that a discount that does not permit viable competition should be presumed unreasonable.[2112] Cable & Wireless and the Telecommunications Resellers Ass'n point out that resale will be a particularly important market entry strategy for small businesses that cannot afford the investments necessary to construct their own facilities or purchase unbundled elements.[2113]

882. Incumbent LECs, cable companies, CAPs, and Sprint generally argue for low wholesale discounts.[2114] Facility-based competitors and potential competitors, such as MFS and cable operators,

[2108] *See, e.g.*, AT&T comments at 82; Cable & Wireless comments at 37; CompTel comments at 96; MFS comments at 72; LCI comments at 31; Telecommunications Resellers Ass'n comments at 24; Teleport comments at 55-56; TCC comments at 45.

[2109] *See, e.g.*, BellSouth comments at 67; SBC comments at 74; District of Columbia Commission comments at 32; Pennsylvania Commission comments at 37.

[2110] Bay Springs, *et al.*, comments at 17; GVNW comments at 40; Rural Tel. Coalition comments at 21. For example, the Rural Telephone Coalition points out that setting a national wholesale discount based on certain assumed levels of marketing expenses overstates avoided costs for small and rural incumbent LECs because such carriers face less competition and therefore have fewer marketing expenses. Rural Telephone Coalition comments at 21. Similarly, Bay Springs, *et al.*, GVNW, and the Rural Telephone Coalition argue that smaller incumbent LECs will not be able to avoid as many shared costs because their smaller staffing and operational functions are less responsive to the overall size of the carriers' operations. Bay Springs, *et al.*, comments at 17; GVNW comments at 40; Rural Tel. Coalition comments at 21.

[2111] *See, e.g.*, AT&T reply at Appendix E (Avoided Cost Model); Cable & Wireless comments at 38.

[2112] AT&T comments at 85.

[2113] Cable & Wireless at 35; Telecommunications Resellers Ass'n at 15. The Competition Policy Institute similarly argues that resale will bring both large and small (resale) carriers into the market. Competition Policy Institute comments at 24.

[2114] *See, e.g.*, GTE reply at 25-26; NYNEX comments at 40-41; NCTA comments at 23; TCI comments at 8; MFS reply at 34-36; Sprint reply at 41.

argue that we should focus our efforts on encouraging facilities-based competition. Such parties, including incumbent LECs, claim that large resale discounts will discourage the development of facilities by making it unnecessary for a new entrant to construct its own facilities in order to compete effectively on the basis of price.[2115] MFS and GTE state that wholesale pricing should only be applied in the absence of facilities-based competition and that once such competition exists, we should forbear from imposing wholesale pricing on incumbent LEC services offered for resale.[2116] Incumbent LECs, cable operators, and Sprint oppose AT&T's proposal that discounts that do not permit viable competition should be presumed unreasonable.[2117]

883. Parties favoring national rules regarding resale differ as to the form such rules should take. Some propose that we establish a methodology for calculating avoided costs. For example, certain parties advocate a rule requiring the use of long-run incremental cost.[2118] Others advocate some form of proxies or presumptions to determine avoided costs. NEXTLINK argues that the Commission should establish a uniform set of presumptions regarding the types of costs that are to be avoided and require that calculations of avoided costs be based on publicly available sources.[2119] NEXTLINK contends that these requirements would allow rapid identification of avoided costs and should lead to the development of presumptive percentage discounts that will apply to retail rates.[2120]

884. Incumbent LECs and MFS also argue that "avoided" costs are those that are actually avoided by such carriers instead of costs that are theoretically "avoidable."[2121] GTE argues that an "avoidable"

[2115] *See, e.g.*, NCTA comments at 29-30; Comcast comments at 21; Cox comments at 32; Time Warner comments at 70; MFS comments at 72; U S West comments, Exhibit A (Federal Implementation of the Telecommunications Act of 1996) at 26; BellSouth comments at Attachment (Interconnection and Economic Efficiency), p. 19; Bell Atlantic comments at Attachment (Declaration of Robert W. Crandall), pp. 4-5.

[2116] This forbearance would be pursuant to 47 U.S.C. § 160. MFS comments at 72 n.80; GTE reply at 26 n.44.

[2117] *See, e.g.*, Bell Atlantic reply at 24; Time Warner reply at 22; Sprint reply at 40.

[2118] *See, e.g.*, GSA/DoD comments at 11.

[2119] NEXTLINK comments at 33.

[2120] *Id.* Also, the Telecommunications Resellers Ass'n advocates establishing a minimal discount, to which states may add, but not delete, unless they petition the FCC for express exemption. Telecommunications Resellers Ass'n comments at 24-25.

[2121] *See, e.g.*, GTE reply at 25-26; NYNEX comments at 81; SBC reply at 15 n.35; USTA reply at 30; MFS comments at 72.

standard improperly measures avoided costs in the long run versus actually avoided costs.[2122] IXCs and resellers argue that the standard should be "avoidable" costs; otherwise, incumbent LECs will be able to game their accounting systems and business practices to minimize actually "avoided" expense.[2123]

885. A number of parties propose that this Commission specify various USOA accounts as avoided costs.[2124] Several parties introduced models or studies that use accounting data to calculate wholesale discounts. These proposals are summarized in detail in the next section.

886. Some parties recommend that we adopt a specific percentage discount from the retail rate. For example, the Massachusetts Attorney General recommends an interim discount of 25 percent until carrier-specific cost studies can be performed.[2125] ACTA suggests that we adopt a 25 percent discount as a national standard.[2126] Several cable interests recommend ten percent maximum discounts, at least until avoided cost studies can be performed.[2127] The Telecommunications Resellers Association suggests that discounts in the range of 30 to 50 percent off the retail rate are necessary to allow resellers to provide competition.[2128] AT&T argues that, whatever discount is selected, states should be allowed to increase it to promote competition.[2129] Furthermore, AT&T argues that states should be allowed to impose penalties in the form of increased discounts for failure to provide service of equivalent quality offered to incumbent LEC customers or to provide electronic interfaces to the incumbent LEC network.[2130] Incumbent LECs

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[2122] *See* Rebuttal Testimony of Douglas E. Wellemeyer, *Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks*, R. 93-04-003 and I. 93-04-002 (California Commission July 10, 1996), submitted as attachment to Letter from Whitney Hatch, Assistant Vice President--Regulatory Affairs, GTE, to John Nakahata, Senior Legal Advisor, Chairman Reed E. Hundt, FCC, July 18, 1996.

[2123] *See, e.g.*, AT&T comments at 84 n.129; Cable & Wireless reply at 29.

[2124] *See* AT&T comments at 83-84 n.130-131; GCI comment at 15; MCI comments at Attachment 2 (Pricing of Wholesale Services); TCC comments at 45-46; Telecommunications Resellers Ass'n comments at 25-26; Sprint comments at Appendix C. While not providing specific USOA accounts, several parties encourage the Commission to identify these accounts. *See*, e.g., ACSI comments at 61.

[2125] Mass. Attorney General comments at 24.

[2126] ACTA comments at 31-32.

[2127] *See, e.g.*, Comcast comments at 21; NCTA comments at 41.

[2128] Telecommunications Resellers Ass'n comments at 24.

[2129] AT&T comments at 84.

[2130] *Id.* at 84-85.

and MFS argue that the 1996 Act does not authorize the service quality penalties or competition-enhancing increased discounts suggested by AT&T.[2131]

887. MFS, Teleport, Time Warner, the Massachusetts Commission, and a number of incumbent LECs argue that joint, common, and overhead costs should not be included in the calculation of avoided costs.[2132] They argue that these costs are not avoided because they will continue to be incurred in providing wholesale service. AT&T, MCI, and others favor inclusion of a portion of joint, common, and overhead costs in avoided costs because these costs will decrease as the overall level of operations of an incumbent LEC decrease (as a result of downscaling their retail operations).[2133]

888. There is significant disagreement about whether wholesale rates should take into account any additional costs incumbent LECs incur in providing wholesale service, such as those relating to wholesale marketing and billing operations. Incumbent LECs, facilities-based competitors, Sprint, and others argue that wholesale rates must include such costs to ensure recovery from the cost-causing parties -- resellers.[2134] Some incumbent LECs note that these additional costs could also be recovered through a separate charge.[2135] IXCs and resellers argue that the plain language of the section 252(d)(3) does not provide for the recognition of these costs.[2136] They also add that allowing incumbent LECs to recover these costs from resellers discourages efficiency in their wholesale operations.[2137]

[2131] *See, e.g.*, MFS reply at 36; Bell Atlantic reply at 24; Sprint reply at 42.

[2132] *See, e.g.*, MFS comments at 74; Teleport comments at 56-57; Time Warner comments at 77; Mass. Commission comments at 14-15; Ameritech comments at 80; BellSouth comments at 67; Cincinnati Bell comments at 35; GTE comments at 51; Lincoln Tel. reply at 8; U S West comments at 68-69; PacTel comments at 90; Rural Tel. Coalition reply at 15; USTA comments at Attachment (Affidavit of Jerry A. Hausman), p. 11.

[2133] *See, e.g.*, TCC comments at 45-46; AT&T reply at Appendix E (Avoided Cost Model); MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 9; Texas Public Utility Counsel comments at 45-46.

[2134] *See, e.g.*, Ameritech comments at 80; Bell Atlantic comments at 44-45; BellSouth comments at Attachment (Interconnection and Economic Efficiency), p. 20; Citizens Utilities comments at 25; USTA comments at Attachment (Affidavit of Jerry A. Hausman), p.12, reply at 29; MFS comments at 73-74; Teleport comments at 57; Time Warner comments at 78; Ohio Commission comments at 59-60, 66; Sprint comments at 72; J. Staurulakis comments at 10.

[2135] *See, e.g.*, BellSouth comments at 67; NYNEX comments at 83.

[2136] *See, e.g.*, AT&T reply at 10; LDDS reply at 45; TCC comments at 47; Cable & Wireless reply at 28-29; Telecommunications Resellers Ass'n reply at 18.

[2137] LDDS reply at 45. LDDS argues that such costs should be recovered in a competitively-neutral manner. *Id.*

889. A number of incumbent LECs oppose application of a single percentage discount rate for all services, arguing that avoided costs will vary among different services.[2138] Some state commissions also recommend against adoption of a uniform rate.[2139] MFS argues that, because section 252(d)(3) refers to retail rates charged to subscribers "for the telecommunications service requested," a uniform wholesale discount rate would frustrate Congressional intent.[2140] Advocates of a uniform discount, however, contend that incumbent LECs will be able to game any system involving a nonuniform allocation of avoided cost, because the information regarding such costs is under their control.[2141] Advocates of a uniform discount also argue that apportioning avoided costs over specific services can be difficult, while a uniform rate is simple to apply. Ameritech argues that the wholesale rate structure of an incumbent LEC should not mirror its retail rate structure. Rather, it should be based on a weighted average of all retail rates provided by the incumbent LEC, less avoided cost.[2142]

3. The Models and Study

890. MCI and AT&T introduced models, and Sprint submitted a study for calculating wholesale rates. This section describes each of these proposals and summarizes the criticisms directed against them. AT&T and MCI offer models which, they contend, can be used to generate discount rates for each incumbent LEC's retail offerings. As an example of the avoided cost approach Sprint advocates, Sprint submits a study based on its United Telephone subsidiary operations in Tennessee.[2143]

891. MCI's model uses publicly available USOA data.[2144] MCI analyzes three categories of avoided cost: (1) marketing, billing, and collection costs; (2) "other costs"; and (3) common costs allocated

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[2138] *See, e.g.*, Bell Atlantic comments at 46; USTA comments at 74-75; MFS comments at 73.

[2139] *See, e.g.*, California Commission comments at 37-38.

[2140] MFS comments at 73.

[2141] *See, e.g.*, Cable & Wireless comments at 47; TCC comments at 47, Telecommunications Resellers Ass'n reply at 18-19; NEXTLINK comments at 33.

[2142] Ameritech comments at 58. For example, this would average various time-of-day plans and usage plans.

[2143] Sprint comments at Appendix C (Avoided Cost Study: Tennessee United Telephone--S.E., Inc.).

[2144] MCI comments at Attachment 2 (Pricing of Wholesale Services).

to avoided cost activities. MCI identifies the following USOA accounts as avoided marketing, billing, and collection costs:

Account 6611 (product management)
Account 6612 (sales)
Account 6613 (product advertising)
Account 6621 (call completion services)
Account 6622 (number services)
Account 6623 (customer services)
Account 6722 (external relations)
Account 6727 (research and development)

MCI treats as "other" avoided costs all of the expenses recorded in the following accounts:

Account 6113 (aircraft expense)
Account 6341 (large PBX expense)
Account 6351 (public telephone terminal equipment expense)
Account 6511 (property held for future telecommunications use)
Account 6512 (provisioning expense)
Account 6562 (depreciation expense--property held for future telecommunications use)
Account 6564 (amortization expense--intangible)

MCI's model also allocates to avoided cost activities a portion of the general overhead and general support expenses recorded in the following accounts:

general overhead

Account 6711 (executive)
Account 6712 (planning)
Account 6721 (accounting and finance)
Account 6723 (human resources)
Account 6724 (information management)
Account 6725 (legal)
Account 6726 (procurement)
Account 6728 (other general and administrative)
Account 6790 (provision for uncollectible notes receivable)

general support

Account 6121 (land and building expense)
Account 6122 (furniture and artworks expense)

Account 6123 (office equipment expense)
Account 6124 (general purpose computers expense)

MCI uses an iterative process to determine separate avoided cost percentages for general overhead costs and for general support costs.[2145] The resulting percentages are based on the relative ratios of avoided costs to total operating expense.[2146] MCI's model assumes that incumbent LECs incur no additional expenses in providing wholesale services.

892. After total avoided costs are determined, MCI subtracts the total avoided costs from total operating expenses to derive total wholesale expenses. MCI then calculates wholesale service revenue using a formula that allows the incumbent LEC the same proportional mark-up above costs on wholesale services as on its retail services.[2147] The formula sets the ratio of total revenue less total expenses to total revenue (retail markup) equal to the ratio of wholesale revenue less wholesale expenses to wholesale revenues (allowable wholesale markup) then computes wholesale revenue (and rates) by solving for that

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[2145] The formulae used by MCI in calculating certain overhead and general support costs are dependent on variables affected by the result of the calculation of such costs. Iteration is a means of solving for variables in such circumstances.

[2146] Total Avoided Expense = [Not Avoided Expenses * 0%] + [Totally Avoided Expenses * 100%] + [Partially Avoided Expenses * a%] + [Partially Avoided Expenses * b%]

Where:

$$a = \text{\% Corporate Operations Avoidable} = \frac{\text{Total Avoided Expenses}}{\text{Total Expenses - Depreciation \& Amortization Expense}}$$

$$b = \text{\% General Support Avoidable} = \frac{\text{Total Avoided Expenses}}{\text{Total Expenses - General Support}}$$

[2147] $$\text{Wholesale Price Discount} = 1 - \frac{\text{Wholesale Service Revenue}}{\text{Total Operating Revenue}}$$

Where:

$$\text{Wholesale Service Revenue} = \frac{\text{Total Wholesale Expenses}}{\text{(1 - Base Margin)}}$$

Total Wholesale Expenses = Total Operating Expenses - Total Avoided Costs

$$\text{Base Margin} = \frac{\text{Total Operating Revenue - Total Operating Expenses}}{\text{Total Operating Revenue}}$$

variable in a simple equation.[2148] MCI computes a wholesale discount rate as one minus the ratio of wholesale revenue over total revenue. Wholesale rates are computed by reducing retail rates by the wholesale discount.

893. MCI proposes that states use its model to calculate a single wholesale discount rate for each incumbent LEC that would apply in every state in which that incumbent LEC does business and for all services the incumbent LEC provides for resale. States would apply that rate to each of the incumbent LECs' retail services. For the seven BOCs and GTE, MCI's calculated wholesale discount factors range from 25 to 35 percent.[2149] MCI suggests that its study be declared presumptively valid by the Commission, but suggests that the Commission allow states to adopt a different resale discount by showing that the model does not produce an accurate result.[2150]

894. Sprint, several incumbent LECs, and potential facilities-based entrants, criticize the MCI model. Lincoln Telephone faults the underlying MCI study for relying on a sample of only eight companies, arguing that the limited sample does not capture the variety of billing, costing and collecting arrangements of all existing carriers.[2151] Several incumbent LECs, although not criticizing the MCI study specifically, oppose any approach that utilizes USOA accounts,[2152] or calculates the resale discount by deducting avoidable, as opposed to actually avoided, costs.[2153] Others attack MCI's method of computing wholesale rates once

[2148] $$\frac{\text{Retail Revenue - Total Expenses}}{\text{Retail Revenue}} = \frac{\text{wholesale revenue - (total expenses - avoided expenses)}}{\text{wholesale revenue}}$$

$$\text{Wholesale Revenue} = \text{Retail Revenue} - \left[\text{Avoided expenses} \times \left[\frac{\text{Retail Revenue}}{\text{Total Expenses}} \right] \right]$$

This is as compared to: Wholesale Revenue = Retail Revenue - Avoided Expenses

[2149] MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 12.

[2150] MCI comments at 90.

[2151] Lincoln Tel. comments at 8-9.

[2152] *See, e.g.*, BellSouth reply at 41; PacTel reply at 45-46.

[2153] *See, e.g.*, SBC reply at 15; NYNEX reply at 40; Ameritech reply at 37-39.

avoided costs are measured.[2154] MFS argues that there is no statutory basis for MCI's use of a formula that removes the markup associated with avoided retail expenses from the retail rates.[2155]

895. AT&T's avoided cost model is similar to MCI's model in that it is an embedded cost approach that starts with publicly-available accounting data.[2156] AT&T's model, however, involves several additional layers of calculations. The model assigns incumbent LEC Automated Record Management Information Systems (ARMIS) revenue and expense data to five lines of business (units). For the local business unit, which it uses as the applicable unit for resale under section 251(c)(4), avoidable expenses are computed by USOA account. AT&T argues that all of the costs associated with the following USOA accounts categories should be excluded as avoided costs, many of which are summary accounts and subsume a set of other accounts:

Account 5300 (uncollectibles)
Account 6220 (operator systems expense) (if appropriate)
Account 6533 (testing expense)
Account 6534 (plant operations administration expense)
Account 6610 (marketing expense)
Account 6620 (customer service expense)

AT&T further argues that the portion of the following USOA accounts associated with the incumbent LEC's retail operations should be excluded as avoided costs:

Account 6110 (network support expense)
Account 6120 (general support expense)
Account 6560 (depreciation expense)
Account 6710 (executive and planning expense)
Account 6720 (general and administrative expense)
Account 7240 (operating other taxes)
Account 7540 (other interest deductions)

[2154] MFS reply at 36.

[2155] *Id.* This was also a point debated by incumbent LECs in various state proceedings. *See, e.g., Petition for a Total Local Exchange Wholesale Service Tariff from Illinois Bell Telephone Company*, Nos. 95-0458 and 95-0531 (consol.) (Illinois Commission June 26, 1996) at 5-20. Teleport argues that the Illinois Commission's decision to include a portion of profit contribution was incorrect. Teleport comments at 59.

[2156] AT&T reply at Appendix E (Avoided Cost Model).

AT&T also recommends partial avoidance of "Total Returns," which refers to portions of the retail rate that contributes to an incumbent LEC's earnings. Ultimately, under AT&T's model, the sum of avoided direct and indirect retail costs is divided by the local service-related revenues to derive the avoided cost discount. AT&T applies its model to each state, with the exception of Alaska, and derives discount rates that range from 23 percent to nearly 56 percent. Parties did not have an opportunity to comment specifically on the AT&T model during the pleading cycle of this proceeding because it was submitted with AT&T's reply. However, AT&T identified in its initial comments the list of fully and partially avoided USOA accounts that were ultimately used in its model. Criticisms of these classifications of fully and partially avoided costs are discussed below.

896. Sprint submits a sample study of its LEC subsidiary operations in Tennessee as an example of how the avoided cost approach advocated by Sprint would be applied.[2157] It was undertaken at the request of the Tennessee Commission to be used under the 1996 Act for calculating wholesale costs. Specifically, the study examines rates for resale of bundled services, focusing on those categories of costs defined in the 1996 Act (marketing, billing, collection, and other costs). Sprint describes its study as employing an activity-based cost approach that identifies the avoided cost by cost category and assigns these costs to service groups, based on a computed factor that assigns each specific type of expense to the activity that creates or drives that expense. Sprint does not provide the worksheets detailing this cost assignment because Sprint considers the worksheets to be proprietary. Costs are identified at the subaccount level. Sprint computes the percentage of avoided costs of providing simple access service at wholesale as a percentage of simple access revenue to be 4.76 percent. Sprint computes a 7.19 percent figure for other services. In its reply comments, Sprint suggests that the AT&T and MCI models significantly overstate incumbent LEC avoided costs.

897. Parties also commented on the specific USOA accounts that should be used to identify avoided costs. We summarize below the comments with respect to the various accounts:

Marketing expenses--Account 6611 (product management), Account 6612 (sales), and Account 6613 (product advertising):

Resellers and most IXCs, other than Sprint, all support identification of these accounts as completely avoidable, both because they are explicitly mentioned in the 1996 Act and because these expenses would not be necessary in a wholesale operation.[2158] Incumbent LECs, Sprint, MFS, and Time Warner argue that

[2157] Sprint comments at Appendix C (Avoided Cost Study: Tennessee United Telephone--S.E., Inc.).

[2158] *See, e.g.*, Cable & Wireless comments at 46 n.77; Telecommunications Resellers Ass'n comments at 25-26; AT&T comments at 84 n.130; CompTel comments at 96-97; MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 5-6.

expenses recorded in these accounts would, in fact, be incurred in connection with the provision of wholesale services such as marketing to wholesalers.[2159]

Services expenses--Account 6621 (call completion services), Account 6622 (number services), and Account 6623 (customer services):

IXCs and resellers contend that all of the expenses recorded in these accounts should be treated as avoidable costs because a reseller will either purchase these services separately or provide them itself.[2160] Incumbent LECs and Sprint argue that these services have no relation to local retail service and therefore cannot be included in avoided costs used to compute wholesale local service rates.[2161]

Information origination/termination expenses and other property, plant and equipment expenses--Account 6341 (large PBX expense), Account 6351 (public telephone terminal equipment expense), Account 6511 (property held for future telecommunications use), and Account 6512 (provisioning expense):

MCI and Cable & Wireless identify accounts 6341 (large PBX expense), 6351 (public telephone terminal equipment expense), 6511 (property held for future telecommunications use) and 6512 (provisioning expense) as completely avoidable,[2162] while incumbent LECs, MFS and Sprint argue that these expenses are not associated with retail activities.[2163]

[2159] *See*, *e.g*., Ameritech reply at 38; Bell Atlantic reply at 23; GTE reply at 25 n.40; MFS reply at 35; Time Warner reply at 21; USTA reply at 30; Sprint reply at 38.

[2160] *See*, *e.g*., AT&T comments at 84 n.130; MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 6; Cable & Wireless comments at 46 n.77; Telecommunications Resellers Ass'n comments at 25-26. CompTel states that such accounts should be avoided where appropriate. CompTel comments at 96-97.

[2161] *See*, *e.g*., Bell Atlantic reply at 23 (with respect to account 6623); USTA reply at 30 (account 6623 includes costs devoted to customer service relating to interexchange service); Sprint reply at 38-39 (also identifies account 6623 as relating to separately billed services). PacTel agrees that costs of directory assistance call allowances, directory listing, and telephone directories will continue to be incurred. PacTel reply at 46.

[2162] MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 8; Cable & Wireless comments at 46 n.77.

[2163] MFS reply at 35-36; Sprint reply at 38; GTE reply at 25 n.40 (at least with respect to accounts 6341 and 6351).

Account 6220 (operator systems expense):

AT&T, TCC, and GCI argue that this account is wholly avoidable where resellers choose not to purchase operator services[2164] while Sprint argues that the account is unrelated to local service.[2165]

Account 6790 (provision for uncollectible notes receivable)/5300 (uncollectible revenue):

AT&T, TCC, and GCI argue that the sum recorded in account 5300 represents a revenue offset that is wholly avoidable.[2166] MCI chooses to measure uncollectibles using account 6790, arguing that expenses in this account are partially avoidable.[2167] Sprint and Time Warner disagree with the contention that uncollectibles are avoidable at all, claiming that uncollectibles may actually increase in a wholesale operation.[2168]

Network support expenses (Accounts 6112-6116):

AT&T, TCC, GCI, and the Telecommunications Resellers Association assert that all of these accounts are partially avoidable.[2169] MCI only discusses account 6113 (aircraft expense), identifying it as completely avoidable because it is not related to wholesale services.[2170] Sprint and MFS disagree, arguing that there is no evidence that costs in these accounts will decrease with wholesale offerings because these expenses will have to continue to be incurred.[2171]

[2164] AT&T reply at Appendix E (Avoided Cost Model); TCC comments at 45 n.45; GCI comments at 1.

[2165] Sprint reply at 38.

[2166] AT&T comments at 84 n.130; AT&T reply, Appendix E (Avoided Cost Model); TCC comments at 45 n.45; GCI comments at 1.

[2167] MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 9.

[2168] Sprint reply at 37; Time Warner reply at 21.

[2169] AT&T comments at 84 n.131; TCC comments at 46 n.46; GCI comments at 1; Telecommunications Resellers Ass'n comments at 25-26.

[2170] MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 8.

[2171] MFS reply at 35 (only discusses account 6113); Sprint reply at 39-40.

General support expenses (Accounts 6121-6124) and Account 6711 (executive), Account 6712 (planning), and Accounts 6721-6728 (general and administrative expenses):

Resellers and IXCs contend that the shared expenses recorded in these accounts are partially avoidable.[2172] MCI and Cable & Wireless identify accounts 6722 (external relations) and 6727 (research and development) as completely avoidable.[2173] MCI argues that overhead costs support all of the activities, including the activities that are avoided when services are sold at wholesale. Therefore, according to MCI, a portion of overhead expenses must be treated as avoided cost.[2174] AT&T argues that wholesaling will necessarily lead to an overall reduction in the size of an incumbent LEC's operations and thus to a reduction in shared expenses.[2175] Sprint and Time Warner argue that there is no evidence to support a conclusion that resale will lead to a general reduction in shared expenses.[2176]

Depreciation and amortization expenses (Accounts 6561-6565) and operating taxes (Accounts 7220-7240):

Resellers and IXCs also argue to varying degrees that such expenses are partially avoidable.[2177] MCI and Cable & Wireless argue for the complete avoidance of accounts 6562 (depreciation expense--property held for future telecommunications use) and 6564 (amortization expense--intangible).[2178] MFS, Sprint, and Time Warner argue that these costs will continue to be incurred for wholesale operations.[2179]

[2172] *See*, *e.g*., Telecommunications Resellers Ass'n comments at 25-26; AT&T comments at 84 n.131.

[2173] MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 6-7; Cable & Wireless comments at 47 n.79.

[2174] MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 9.

[2175] AT&T reply, Appendix E (Avoided Cost Model) at 2.

[2176] Sprint reply at 39-40; Time Warner reply at 21

[2177] *See*, *e.g*., Telecommunications Resellers Ass'n comments at 25-26; AT&T comments at 84 n.131; CompTel comments at 97.

[2178] MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 9; Cable & Wireless comments at 47 n.79.

[2179] MFS reply at 35-36 (account 6564 is not related to retail); Sprint reply at 39-40; Time Warner reply at 21.

Other partially avoided accounts:

AT&T, TCC, and GCI argue that accounts 6533 (testing expenses), 6534 (plant operations administration expense), and 7540 (other interest), and total returns are partially avoidable[2180] while Sprint disagrees.[2181]

4. State Decisions

898. Several state commissions have already made interim or final determinations with respect to wholesale rates. Some, like the California and Maryland commissions, did not purport to apply or interpret the 1996 Act. Others, including the Illinois and Georgia commissions, explicitly applied section 252(d)(3) in reaching their decisions. Post-1996 Act state decisions announced to date are summarized below.

899. *California:* The California Commission adopted interim rules, effective March 31, 1996, for the resale of local exchange services by competitive LECs within the areas served by Pacific and GTE.[2182] Although the record in that proceeding was closed before the passage of the 1996 Act, the California Commission applied a "retail rates minus avoided cost" standard similar to that contained in section 252(d)(3) for purposes of setting interim rates. The California Commission used an embedded cost study and USOA accounting data to calculate business discounts rates of 17 percent for PacTel and 12 percent for GTE. Because it had previously found that residential rates were already below direct embedded cost, the California Commission applied to residential services a reduced discount rate of 10 percent for PacTel and 7 percent for GTE. In arriving at this conclusion, the California Commission considered uncollectibles, marketing, and customer service expenses to be partially avoidable, to varying degrees.

900. *Colorado:* The Colorado Commission established a business discount rate of 16 percent and a residential discount rate of 9 percent.[2183] Using Colorado-specific embedded cost information previously filed by U S West as part of an annual report to that commission, the Colorado Commission calculated avoided costs for five categories of services. The Colorado Commission treated the following costs as totally avoided: uncollectibles; direct expense associated with operator services; customer operations (product management, sales, and product advertising); call completion; and number services.

[2180] AT&T comments at 84 nn.130-31; TCC comments at 46 n.46; GCI comments at 1. Sprint does not comment on account 7540.

[2181] Sprint reply at 39-40.

[2182] *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, R. 95-04-043 and I. 95-04-044 (California Commission April 26, 1996). Although the final order was not issued until April 26, 1996, it became effective March 31, 1996.

[2183] *U S West Communications, Inc. Filing Advice Letter No. 2610 in Compliance with Commission Decision No. C96-521 Adopting Emergency Rules*, Docket No. 96S-233T (Colorado Commission June 21, 1996).

The Colorado Commission also considered 95 percent of the costs of customer services to be avoidable. General purpose computer expense and related depreciation, and general corporate overheads, were treated as partially avoided. The Colorado Commission concluded that wholesale discounts should be as follows: residential, 9 percent; business, 16 percent; toll services, 30 percent; central office-based features, 50 percent; all other services, 18 percent.

901. *Georgia:* The Georgia Commission established a 20.3 percent discount rate for wholesale residential service and a 17.3 percent discount rate for wholesale business service.[2184] The Georgia Commission used embedded cost information to calculate avoided direct expenses. The Georgia Commission also found that a percentage of general support, administrative, and corporate operations expenses should be considered avoided costs. In computing its final discounts, the Georgia Commission apportioned total avoided expense between residential and business services according to BellSouth's revenues for the two categories. Prior to such apportionment, the Georgia Commission's discount was 18.74 percent.

902. *Illinois:* The Illinois Commission released an order on June 26, 1996, setting wholesale discount rates for Ameritech and Centel local exchange services.[2185] The Illinois Commission applied the section 252(d)(3) pricing standard, but rejected use of embedded cost studies as inconsistent with the Commission's established cost of service rules. Instead, the Illinois Commission based its analysis on a methodology that begins with retail rates, then subtracts: (1) the "total assigned cost" of retail functions; and (2) a *pro rata* share of contribution attributable to the avoided retail costs. Total assigned costs include the long-run incremental costs of a service plus some shared and administrative costs. Contribution is the difference between retail price and long-run incremental cost. The Illinois Commission expects that this methodology, when applied to individual Ameritech services using the carrier's most recently-filed cost studies, will produce an average discount rate of 20.07 percent.[2186] The Illinois Commission applied the same rate to Centel, pending completion by Centel of the cost studies needed to apply the Illinois Commission's adopted methodology.

[2184] *Petition of AT&T for the Commission to Establish Resale Rules, Rates, Terms, and Conditions and Initiate Unbundling of Services*, Docket No. 6352U (Georgia Commission June 21, 1996).

[2185] *Petition for a Total Local Exchange Wholesale Service Tariff from Illinois Bell Telephone Company*, Nos. 95-0458 and 95-0531 (consol.) (Illinois Commission June 26, 1996).

[2186] The Illinois Commission notes that the pricing methodology that it adopted would yield an average discount of 20.07 percent if applied at the individual service level and 16.63 percent if applied to the "family" service level. *Id.* at 10. Illinois decided that the individual service application avoided certain pricing anomalies and was more consistent with the 1996 Act. *Id.* at 20.

903. *Louisiana:* The Louisiana Commission established regulations concerning resale of telecommunications services on March 15, 1996.[2187] As an interim measure, until the Louisiana Commission can determine wholesale rates based on TSLRIC cost studies, the commission has set wholesale rates at the incumbent LEC's current tariffed retail rates minus 10 percent. This calculation reflects the incumbent LEC's avoidance of retail costs, including but not limited to, sales, marketing and customer services associated with the resold items.

904. *Maryland:* The Maryland Commission adopted, without analyzing cost studies, an interim discount rate of 10 percent, pending completion of the instant rulemaking proceeding.[2188]

905. *New York:* The New York Commission established temporary wholesale discounts for NYNEX and Rochester Telephone on July 18 of this year.[2189] The New York Commission calculates for NYNEX a 17 percent discount for residential service and an 11 percent discount for business service. Separate avoided cost percentages were derived for different shared expense categories, ranging from five percent for general and administrative expenses to 12.7 percent for network support expense. For marketing categories, 20 percent of product management, 50 percent of sales, and 50 percent of advertising expenses were considered avoidable. All uncollectibles were considered avoidable. Calculating these and other avoided costs, the New York Commission arrived at a 15 percent discount. Because the New York Commission observed that business lines produce higher overall revenue and thus artificially inflate avoided cost for business lines (and undervalue the avoided cost for residential lines), a 17 percent discount was set for residential service while only an 11 percent discount was set for business service. A uniform 13.5 percent discount was ordered for Rochester Telephone, based on a New York Commission analysis of Rochester's 1995 annual report, using principles similar to those applied to NYNEX.

[2187] *In re: Regulations for Competition in the Local Telecommunications Market*, Docket U-200883 (Louisiana Commission March 15, 1996).

[2188] *Wholesale Rates for Telecommunications Services Ruling on AT&T's Petition for a Reduction on the Wholesale Rates of Bell Atlantic--Maryland, Inc.*, Case No. 8721 (Maryland Commission June 27, 1996).

[2189] *Joint Complaint of AT&T Communications of New York, Inc., MCI Telecommunications Corporation, WorldCom, Inc. d/b/a LDDS WorldCom and the Empire Association of Long Distance Telephone Companies, Inc. Against New York Telephone Company Concerning Wholesale Provisioning of Local Exchange Service by New York Telephone Company and Sections of New York Telephone's Tariff No. 900*, Case 95-C-0657 (New York Commission July 18, 1996); *Petition of Rochester Telephone Corp. for Approval of a Proposed Restructuring Plan*, Case 93-C-0103 (New York Commission July 18, 1996).

906. *Ohio*: The Ohio Commission has established rules for pricing wholesale services for resale, but has not publicly released calculations of specific discounts for particular services.[2190] The Ohio Commission established a presumption that all expenses contained in the following USOA accounts will be avoided: 5300 (uncollectible revenue), 6611 (product management), 6612 (sales), 6613 (product advertising), 6621 (call completion service), 6622 (number services expense), and 6623 (customer service).[2191] The Ohio Commission's rules require resellers seeking to avoid additional costs to prove that such costs would be avoided in wholesale operations. Beyond the avoided expenses discussed above, the Ohio Commission requires avoided costs to include "direct and indirect costs of all activities eliminated due to the wholesale provisioning."

5. Discussion

907. Resale will be an important entry strategy for many new entrants, especially in the short term when they are building their own facilities. Further, in some areas and for some new entrants, we expect that the resale option will remain an important entry strategy over the longer term. Resale will also be an important entry strategy for small businesses that may lack capital to compete in the local exchange market by purchasing unbundled elements or by building their own networks. In light of the strategic importance of resale to the development of competition, we conclude that it is especially important to promulgate national rules for use by state commissions in setting wholesale rates. For the same reasons discussed in Section II.D of the Order, we believe that we have legal authority under the 1996 Act to articulate principles that will apply to the arbitration or review of wholesale rates. We also believe that articulating such principles will promote expeditious and efficient entry into the local exchange market. Clear resale rules will create incentives for parties to reach agreement on resale arrangements in voluntary negotiations. Clear rules will also aid states in conducting arbitrations that will be administratively workable and will produce results that satisfy the intent of the 1996 Act. The rules we adopt and the determinations we make in this area are crafted to achieve these purposes. We also note that clear resale rules should minimize regulatory burdens and uncertainty for all parties, including small entities and small incumbent LECs.[2192]

908. The statutory pricing standard for wholesale rates requires state commissions to (1) identify what marketing, billing, collection, and other costs will be avoided by incumbent LECs when they provide services at wholesale; and (2) calculate the portion of the retail prices for those services that is attributable to the avoided costs. Our rules provide two methods for making these determinations. The first, and

[2190] *Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues*, Case No. 95-845-TP-COI (Ohio Commission June 12, 1996).

[2191] The Ohio Commission also lists account 6610, which is the summary account for marketing expenses (accounts 6611-6613).

[2192] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

preferred, method requires state commissions to identify and calculate avoided costs based on avoided cost studies. The second method allows states to select, on an interim basis, a discount rate from within a default range of discount rates adopted by this Commission. They may then calculate the portion of a retail price that is attributable to avoided costs by multiplying the retail price by the discount rate.

909. We adopt a minimum set of criteria for avoided cost studies used to determine wholesale discount rates. The record before us demonstrates that avoided cost studies can produce widely varying results, depending in large part upon how the proponent of the study interprets the language of section 252(d)(3). The criteria we adopt are designed to ensure that states apply consistent interpretations of the 1996 Act in setting wholesale rates based on avoided cost studies which should facilitate swift entry by national and regional resellers, which may include small entities.[2193] At the same time, our criteria are intended to leave the state commissions broad latitude in selecting costing methodologies that comport with their own ratemaking practices for retail services. Thus, for example, our rules for identifying avoided costs by USOA expense account are cast as rebuttable presumptions, and we do not adopt as presumptively correct any avoided cost model.

910. Based on the comments filed in this proceeding and on our analysis of state decisions setting wholesale discounts, we adopt a default range of rates that will permit a state commission to select a reasonable default wholesale rate between 17 and 25 percent below retail rate levels. A default wholesale discount rate shall be used if: (1) an avoided cost study that satisfies the criteria we set forth below does not exist; (2) a state commission has not completed its review of such an avoided cost study; or (3) a rate established by a state commission before release of this Order is based on a study that does not comply with the criteria described in the following section. A state commission must establish wholesale rates based on avoided cost studies within a reasonable time from when the default rate was selected. This approach will enable state commissions to complete arbitration proceedings within the statutory time frames even if it is infeasible to conduct full-scale avoided cost studies that comply with the criteria described below for each incumbent LEC.

a. Criteria for Cost Studies

911. There has been considerable debate on the record in this proceeding and before the state commissions on whether section 252(d)(3) embodies an "avoided" cost standard or an "avoidable" cost standard. We find that "the portion [of the retail rate] . . . attributable to costs that will be avoided" includes all of the costs that the LEC incurs in maintaining a retail, as opposed to a wholesale, business. In other words, the avoided costs are those that an incumbent LEC would no longer incur if it were to cease retail operations and instead provide all of its services through resellers. Thus, we reject the arguments of incumbent LECs and others who maintain that the LEC must actually experience a reduction in its operating

[2193] *See Id.*

expenses for a cost to be considered "avoided" for purposes of section 252(d)(3). We do not believe that Congress intended to allow incumbent LECs to sustain artificially high wholesale prices by declining to reduce their expenditures to the degree that certain costs are readily avoidable. We therefore interpret the 1996 Act as requiring states to make an objective assessment of what costs are reasonably avoidable when a LEC sells its services wholesale. We note that Colorado, Georgia, Illinois, New York, and Ohio commissions have all interpreted the 1996 Act in this manner.[2194]

912. We find that, under this "reasonably avoidable" standard discussed above, an avoided cost study must include indirect, or shared, costs as well as direct costs. We agree with MCI, AT&T, and the California, Illinois, Ohio, Colorado, and Georgia commissions that some indirect or shared costs are avoidable and likely to be avoided when a LEC provides retail services to a reseller instead of to the end user. This is because indirect or shared costs, such as general overheads, support all of the LEC's functions, including marketing, sales, billing and collection, and other avoided retail functions. Therefore, a portion of indirect costs must be considered "attributable to costs that will be avoided" pursuant to section 252(d)(3). It is true that expenses recorded in indirect or shared expense accounts will continue to be incurred for wholesale operations. It is also true, however, that the overall level of indirect expenses can reasonably be expected to decrease as a result of a lower level of overall operations resulting from a reduction in retail activity.

913. A portion of contribution, profits, or mark-up may also be considered "attributable to costs that will be avoided"[2195] when services are sold wholesale. MCI's model makes this attribution by means of a calculation that applies the same mark-up to wholesale services as to retail services. The Illinois Commission achieved a similar effect by removing a *pro rata* portion of contribution from the retail rate for each service. In AT&T's model, the portion of return on investment (profits) that was attributable to assets

[2194] *See, e.g., U S West Communications, Inc. Filing Advice Letter No. 2610 in Compliance with Commission Decision No. C96-521 Adopting Emergency Rules*, Docket No. 96S-233T (Colorado Commission June 21, 1996) at paras. 12-13; *Petition of AT&T for the Commission to Establish Resale Rules, Rates, Terms, and Conditions and Initiate Unbundling of Services*, Docket No. 6352U (Georgia Commission June 21, 1996); *Petition for a Total Local Exchange Wholesale Service Tariff from Illinois Bell Telephone Company*, Nos. 95-0458 and 95-0531 (consol.) (Illinois Commission June 26, 1996) at 27-34; *Joint Complaint of AT&T Communications of New York, Inc., MCI Telecommunications Corporation, WorldCom, Inc. d/b/a LDDS WorldCom and the Empire Association of Long Distance Telephone Companies, Inc. Against New York Telephone Company Concerning Wholesale Provisioning of Local Exchange Service by New York Telephone Company and Sections of New York Telephone's Tariff No. 900*, Case 95-C-0657 (New York Commission July 18, 1996); *Petition of Rochester Telephone Corp. for Approval of a Proposed Restructuring Plan*, Case 93-C-0103 (New York July 18, 1996); *Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues*, Case No. 95-845-TP-COI (Ohio Commission June 12, 1990) at 30-31.

[2195] 47 U.S.C. § 252(d)(3).

used in avoided retail activities was treated as an avoided cost. We find that these approaches are consistent with the 1996 Act.

914. An avoided cost study may not calculate avoided costs based on non-cost factors or policy arguments, nor may it make disallowances for reasons not provided for in section 252(d)(3). The language of section 252(d)(3) makes no provision for selecting a wholesale discount rate on policy grounds. We therefore reject NCTA's argument that discount rates should be ten percent or less in order to avoid discouraging facilities-based competition, as well as AT&T's suggestion that wholesale discount rates should be set at levels that ensure the viability of the reseller's business. We also reject, for example, MCI's assertion that no external relations or research and development costs should be allowed in wholesale rates because the activities represented by those costs are contrary to the interests of the LEC competitors that purchase wholesale services.[2196] Our analysis also precludes a state commission from adopting AT&T's suggestion that an increment should be added to the base discount rate to compensate resellers for alleged deficiencies in the provisioning of services.

915. The 1996 Act requires that wholesale rates be based on existing retail rates, and thus clearly precludes use of a "bottom up" TSLRIC study to establish wholesale rates that are not related to the rates for the underlying retail services. We thus reject the suggestions of those parties that ask us to require use of TSLRIC to set wholesale rates. The 1996 Act does not, however, preclude use of TSLRIC cost studies to identify the portion of a retail rate that is attributable to avoided retail costs. TSLRIC studies would be entirely appropriate in states where the retail rates were established using a TSLRIC method. For example, the Illinois Commission calculated its wholesale rate using an avoided cost formula and long run incremental cost studies. Embedded cost studies, such as the studies used by the Georgia Commission, may also be used to identify avoided costs. Ideally, a state would use a study methodology that is consistent with the manner in which it sets retail rates.

916. We neither prohibit nor require use of a single, uniform discount rate for all of an incumbent LEC's services. We recognize that a uniform rate is simple to apply, and avoids the need to allocate avoided costs among services. Therefore, our default wholesale discount is to be applied uniformly. On the other hand, we also agree with parties who observe that avoided costs may, in fact, vary among services. Accordingly, we allow a state to approve nonuniform wholesale discount rates, as long as those rates are set on the basis of an avoided cost study that includes a demonstration of the percentage of avoided costs that is attributable to each service or group of services.

917. All costs recorded in accounts 6611 (product management), 6612 (sales), 6613 (product advertising) and 6623 (customer services) are presumed to be avoidable. The costs in these accounts are the direct costs of serving customers. All costs recorded in accounts 6621 (call completion services) and

[2196] *See* MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 6-7.

6622 (number services) are also presumed avoidable, because resellers have stated they will either provide these services themselves or contract for them separately from the LEC or from third parties. These presumptions regarding accounts 6611-6613 and 6621-6623 may be rebutted if an incumbent LEC proves to the state commission that specific costs in these accounts will be incurred with respect to services sold at wholesale, or that costs in these accounts are not included in the retail prices of the resold services.

918. General support expenses (accounts 6121-6124), corporate operations expenses (accounts 6711, 6612, 6721-6728), and telecommunications uncollectibles (account 5301) are presumed to be avoided in proportion to the avoided direct expenses identified in the previous paragraph. Expenses recorded in these accounts are tied to the overall level of operations in which an incumbent LEC engages. Because the advent of wholesale operations will reduce the overall level of operations -- for example, staffing should decrease because customer inquiries and billing and collection activity will decrease -- overhead and support expenses are in part avoided. We select the revenue offset account of 5301 rather than accounts 5300 or 6790 because account 5301 most directly represents overheads attributable to the services being resold.

919. Plant-specific and plant non-specific expenses (other than general support expenses) are presumptively not avoidable.

920. In the case of carriers designated as Class B under section 32.11 of our rules that use certain summary accounts in lieu of accounts designated in this subsection of the Order, our avoided cost study criteria shall apply to the relevant summary account in its entirety.[2197]

b. Default Range of Wholesale Discount Rates

921. Parties to this proceeding present evidence or arguments supporting wholesale discount rates ranging from 4.76 percent to 55 percent:

Sprint/United Telephone study	
Simple Access service:	4.76%
Other services:	7.19%
NCTA	10.0%
Comcast	10.0%
Massachusetts Attorney General	25.0%
ACTA	25.0%

[2197] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

MCI Model	25.6-33.2%[2198]
Telecommunications Resellers Ass'n	30.0-50.0%
AT&T Model	23.05%-55.52%[2199]

922. States applying wholesale pricing standards similar to the standards in section 252(d)(3) have set the following wholesale discounts:

California	
PacTel	
Business	17.0%
Residential	10.0%
GTE	
Business	12.0%
Residential	7.0%
Colorado	
Residential	9.0%
Business	16.0%
Toll Services	30.0%
Central Office-Based Features	50.0%[2200]
All other services	18.0%
Georgia	
Residential	20.3%
Business	17.3%
Illinois	20.07%[2201]

2198 MCI calculated rates based on actual accounting data for the years 1990-1995 for each RBOC and for GTE. For 1995 the rates ranged from 25.6 percent for U S West to 33.2 percent for Ameritech. MCI also calculates rates for 1996 using estimated data. MCI comments at Attachment 2 (Pricing of Wholesale Services), p. 1.

2199 AT&T calculated separate discount rates for each RBOC study area and for SNET and GTE Hawaiian Tel.

2200 Central office-based services are custom calling features such as speed dialing and CLASS features, such as caller ID. *U S West Communications, Inc. Filing Advice Letter No. 2610 in Compliance with Commission Decision No. C96-521 Adopting Emergency Rules*, Docket No. 96S-233T (Colorado Commission June 21, 1996) at para. 13.

2201 The Illinois Commission requires wholesale discounts to be computed on a service-specific basis. The 20.07 percent figure represents an "average" discount using such a methodology.

New York	
NYNEX	
Business	17.0%
Residential	11.0%
Rochester Telephone	13.5%

923. We find unpersuasive various arguments presented by parties at the lower and higher ends of the range of possible discounts. The Sprint/United Telephone study produces unreasonably low measures of avoided costs because the study considers only avoided direct expenses in five accounts. As explained above, we interpret the statutory language providing for a wholesale price that excludes the "portion [of a retail rate] attributable to any marketing, billing, collection, and other costs that will be avoided"[2202] to include indirect as well as direct costs. The proposals of NCTA and Comcast for a maximum discount of 10 percent are premised on the view that any greater discount would unduly discourage facilities-based competition. Section 252(d)(3), however, requires wholesale prices to be set based on avoided costs, not on any policy preference for facilities-based competition. For the same statutory reason, we reject as inconsistent with section 252(d)(3) the policy arguments of the Telecommunications Resellers Association and AT&T that we should establish national wholesale discounts at levels that will ensure that resale of local exchange services is a viable business.[2203]

924. We find AT&T's model unsuitable for purposes of establishing in this proceeding a range for default wholesale discount rates. The AT&T model does in many respects satisfy the general criteria we establish above for avoided cost studies. The model, however, incorporates numerous assumptions, cost allocation factors, and studies, and because AT&T submitted its model with its reply comments, and other parties have not analyzed the model in detail. We find that we would need to develop a more complete record on the AT&T model before deciding whether to endorse it. We do not, however, preclude a state commission from considering in a wholesale rate proceeding evidence developed using this model.

925. We find that we can use MCI's model, with some modifications, along with the results of certain state proceedings, to establish a range of rates that would produce an acceptable default wholesale discount rate that reasonably approximates the amount of avoided costs that should be subtracted from the retail rate. A default rate is to be used only in three instances: (1) in a state arbitration proceeding if an avoided cost study that satisfies the criteria we set forth above does not exist; (2) where a state has not completed its review of such an avoided cost study; (3) where a rate established by a state before the release date of this Order is based on a study that does not comply with the criteria described in the

[2202] 47 U.S.C. § 252(d)(3).

[2203] *See* AT&T comments at 81-86; Telecommunications Resellers Ass'n comments at 24.

previous section. We emphasize that the default rate is to be used as an interim measure only, and should be replaced with an avoided cost study within a reasonable time. The MCI model is a reasonable attempt at estimating avoided cost in accordance with section 252(d)(3) using only publicly-available data. We find, however, that we should modify certain features of the model.

926. First, MCI treats account 6722 (external relations) and account 6727 (research and development) as avoidable costs. MCI argues that purchasers of wholesale services are competing with LECs and, therefore, should not be forced to fund regulatory activities reflected in account 6722. MCI claims that research and development are not of practical use for the services that resellers will purchase. As explained above, this type of disallowance is not contemplated by the avoided cost standard of section 252(d)(3). We therefore adjust the model to treat these costs in the same manner as other overhead expense accounts.

927. Second, MCI treats a number of accounts as "other avoided costs" on the grounds that the expenses in those accounts are not relevant to the provision of telecommunications services that an incumbent LEC currently provides.[2204] Public telephone terminal equipment expense and large PBX expense are not "avoided" precisely because they are unrelated to the retail services being discounted. We would not expect these expenses to be included in retail service rates for resold services; but if these expenses were included in retail rates, they would not be avoided when the services are purchased by resellers. The rest of MCI's "other" accounts contain costs that support all of the telecommunications services offered by the company. MCI has not shown that any of these costs are either reduced or eliminated when services are sold at wholesale. We, therefore, adjust the MCI model so as not to treat these accounts as avoidable costs.

928. Third, MCI treats accounts 6611 (product management), 6612 (sales), 6613 (product advertising), and 6623 (customer services) as costs that are entirely avoided with respect to services purchased at wholesale. We agree that a large portion of the expenses in these accounts is avoided when service is sold at wholesale. We also agree, however, with parties that argue that some expenses in these accounts will continue to be incurred with respect to wholesale products and customers, and that some new expenses may be incurred in addressing the needs of resellers as customers. No party in this proceeding has suggested a specific adjustment to the MCI model that would account for these costs of the wholesale operation. We note that, in their own proceedings, several states have made varying estimates concerning the level of wholesale-related expenses in these accounts. Colorado, for example, estimated that none of the costs in accounts 6611-6613 would relate to wholesale services, and that only five percent of the costs

[2204] Based on this rationale, MCI excludes account 6113 (aircraft expense), account 6341 (large PBX expense), account 6511 (property held for future telecommunications use expense), account 6351 (public telephone terminal equipment expense), account 6512 (provisioning expense), account 6562 (depreciation expense for property held for future telecommunications use), and account 6564 (amortization expense, intangible).

in account 6623 would be incurred in a wholesale operation.[2205] The Georgia Commission, on the other hand, decided that 25 percent of sales and product advertising expenses would continue to be incurred in the wholesale operation.[2206] Given the lack of evidence, and the wide range of estimates that have been made by these states, we find it reasonable to assume, for purposes of determining a default range of wholesale discount rates, that ten percent of costs in accounts 6611, 6612, 6613, and 6623 are not avoided by selling services at wholesale.

929. Fourth, MCI uses a complex formula to calculate the portions of overhead and general support expense that are attributable to avoided costs. We find that this formula is constructed in a way that tends to inflate the results of the calculation. We have, therefore, substituted a more straightforward approach in which we apply to each indirect expense category the ratio of avoided direct expense to total expenses. We also identify a slightly different list of accounts representing indirect costs than that proposed by MCI.

930. With the modifications described above, and using actual 1995 data, MCI's model produces the following results for the RBOCs and GTE:

U S West	18.80%
GTE	18.81%
BellSouth	19.20%
Bell Atlantic	19.99%
SBC	20.11%
NYNEX	21.31%
Pacific	23.87%
Ameritech	25.98%

931. We also take into account the experience of those state commissions, Illinois and Georgia, that have undertaken or approved detailed avoided cost studies under the pricing standard of section 252(d)(3) of the 1996 Act. Applying the statutory standard to the examination of significant cost studies,

[2205] *U S West Communications, Inc. Filing Advice Letter No. 2610 in Compliance with Commission Decision No. C96-521 Adopting Emergency Rules*, Docket No. 96S-233T (Colorado Commission June 21, 1996) at para. 12 and n.20. The Colorado Commission explained that it chose 5 percent because "some small portion of customer services will remain for the interfaces of Operational Support Systems of [U S West] and the resellers, but nowhere near the amount necessary for direct customer contact services." *Id.* n.20.

[2206] *Petition of AT&T for the Commission to Establish Resale Rules, Rates, Terms, and Conditions and Initiate Unbundling of Services*, Docket No. 6352U (Georgia Commission June 21, 1996) at Appendix 1. The Georgia Commission characterized its calculations with respect to sales expense as "conservative at best."

those commissions derived average wholesale discounts of 18.74 percent[2207] and 20.07 percent. We find that these decisions present evidence of an appropriate wholesale discount that should be given more weight than state commission decisions that have set their discounts under other pricing standards or only on an interim basis.[2208]

932. Accordingly, based on the record before us, we establish a range of default discounts of 17-25 percent that is to be used in the absence of an avoided cost study that meets the criteria set forth above. A state commission that has not set wholesale prices based on avoided cost studies that meet the criteria set forth above as of the release date of this Order shall use a default wholesale discount rate between 17 and 25 percent. A state should articulate the basis for selecting a particular discount rate. If this default discount rate is used, the state commission must establish wholesale rates based on avoided cost studies within a reasonable time. The avoided cost study must comply with the criteria for avoided cost studies described above. A state commission may submit an avoided cost study to this Commission for a determination of whether it complies with these criteria. If a party (either a reseller or an incumbent LEC) believes that a state commission has failed to act within a reasonable period of time, that party may file a petition for declaratory ruling with this Commission, asking us to determine whether the state has failed to comply with this rule. We will, in making such determinations, consider the particular circumstances in the state involved. If a state commission has adopted as of the release date of this Order an interim wholesale pricing decision that relies on an avoided cost study that meets the criteria set forth above, the state commission may continue to require an incumbent LEC to offer services for resale under such interim wholesale prices in lieu of the default discount range, so long as the state commission's interim pricing rules are fully enforceable by resellers and followed by a final decision within a reasonable period of time that adopts an avoided cost study that meets the criteria set forth above.

933. We select the 17 to 25 percent range of default discounts based on our evaluation of the record. The adjusted results of the MCI model taken together with the results of those state proceedings discussed above that indicated they applied the statutory standard produces, a range between 18.74 and 25.98 percent. A majority of these wholesale discount rates fall between 18.74 and 21.11 percent. Other

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[2207] Prior to apportioning avoided costs between business and residential services, the Georgia Commission's avoided cost computation would have yielded an aggregate wholesale discount rate of 18.74 percent. This figure is computed by dividing the total avoided costs computed by the Georgia Commission by the total BellSouth residential and business revenues (which were used individually both to apportion total avoided costs between residential and business service and as the denominator in the final wholesale discount calculations).

[2208] *See, e.g.*, *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, R. 95-04-043 and I. 95-04-044 (California Commission April 26, 1996); *U S West Communications, Inc. Filing Advice Letter No. 2610 in Compliance with Commission Decision No. C96-521 Adopting Emergency Rules*, Docket No. 96S-233T (Colorado Commission June 21, 1996); *Wholesale Rates for Telecommunications Services Ruling on AT&T's Petition for a Reduction on the Wholesale Rates of Bell Atlantic--Maryland, Inc.*, Case No. 8721 (Maryland Commission June 27, 1996).

state commissions, such as California and New York, that have employed avoided cost studies have produced wholesale discount rates somewhat below the low end of this range. Furthermore, it has been argued that smaller incumbent LECs' avoided costs are likely to be less than those of the larger incumbent LECs, whose data was used by MCI. Therefore, to allow for these considerations, we select 17 percent as the lower end of the range.[2209] We select 25 percent as the top of the range because it approximates the top of the range of results produced by the modified MCI model. This range gives state commissions flexibility in addressing circumstances of incumbent LECs serving their states and permits resale to proceed until such time as the state commission can review a fully-compliant avoided cost study.

934. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, Bay Springs, *et al.*, argues that national wholesale pricing rules will insufficiently consider operational differences between small and large incumbent LECs.[2210] We take this into consideration in setting the default discount rate and in requiring state commissions to perform carrier-specific avoided cost studies within a reasonable period of time that will reflect carrier-to-carrier differences. We believe, however, that the procompetitive goals of the 1996 Act require us to establish a default discount rate for state commissions to use in the absence of avoided cost studies that comply with the criteria we set forth above. The presumptions we establish in conducting avoided cost studies regarding the avoidability of certain expenses may be rebutted by evidence that certain costs are not avoided, which should minimize any economic impact of our decisions on small incumbent LECs. We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act.

C. Conditions and Limitations

935. Section 251(c)(4) requires incumbent LECs to make their services available for resale without unreasonable or discriminatory conditions or limitations. This portion of this Order addresses various issues relating to conditions or limitations on resale. It first discusses restrictions, generally, in Section VIII.C.1. Next, it turns to promotional and discounted offerings and the conditions that may attach to such offerings in Section VIII.C.2., and then to refusals to resell residential and below-cost services in Section VIII.C.3. Limitations on the categories of customers to whom a reseller may sell incumbent LEC services are discussed in VIII.C.4. Resale restrictions in the form of withdrawal of service are discussed in VIII.C.5. Finally, Section VIII.C.6. discusses resale restrictions relating to provisioning.

1. Restrictions, Generally, and Burden of Proof

[2209] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

[2210] Bay Springs, *et al.*, comments at 17.

a. Background and Comments

936. In the NPRM, we asked whether incumbent LECs should have the burden of proving that restrictions on resale are reasonable and nondiscriminatory.[2211] We stated our belief that, given the pro-competitive goals of the 1996 Act and the view that restrictions and conditions were likely to be evidence of an exercise of market power, the range of permissible restrictions should be quite narrow.[2212]

937. A number of parties, including IXCs, resellers, and some state commissions, agree that incumbent LECs should have the burden of justifying any restrictions they impose on the resale of their services.[2213] For example, Jones Intercable proposes a requirement that incumbent LECs prove that a proposed condition or restriction will directly advance an important public policy objective and that the benefits of the condition plainly outweigh its anticompetitive effects.[2214] Many add the caveat that the only permissible restriction should be the cross-class restriction, section 251(c)(4)(B), prohibiting resellers that obtain at wholesale rates telecommunications services that are available at retail only to a category of subscribers from offering such services to a different category of subscribers.[2215] The Texas Public Utility Counsel suggests that the relevant determination is whether an incumbent LEC could impose the condition in question in a competitive market.[2216]

938. Incumbent LECs support various restrictions and limitations.[2217] BellSouth and the Ohio Consumers' Counsel further suggest that the burden of justifying restrictions and limitations should not be placed on LECs.[2218]

[2211] NPRM at para. 175.

[2212] *Id.*

[2213] *See, e.g.*, ACSI comments at 60; California Commission comments at 35-37; CFA/CU comments at 17; Citizens Utilities comments at 27; Colorado Commission comments at 52-53; Jones Intercable comments at 24; MFS comments at 70; NEXTLINK comments at 30; Pennsylvania Commission comments at 36; Ohio Commission comments at 62; TCC comments at 43; Telecommunications Resellers Ass'n comments at 20; Washington Commission comments at 32.

[2214] Jones Intercable comments at 32-33.

[2215] *See, e.g.*, CFA/CU comments at 17; Citizens Utilities at 27; Colorado Commission comments at 52-53; TCC comments at 43. Many of these parties offer a narrow interpretation of section 251(c)(4)(B), which will be discussed, *infra.*

[2216] Texas Public Utilities Counsel reply at 42.

[2217] *See, e.g.*, BellSouth comments at 66.

[2218] BellSouth comments at 65; Ohio Consumers' Counsel comments at 35.

b. Discussion

939. We conclude that resale restrictions are presumptively unreasonable. Incumbent LECs can rebut this presumption, but only if the restrictions are narrowly tailored. Such resale restrictions are not limited to those found in the resale agreement. They include conditions and limitations contained in the incumbent LEC's underlying tariff. As we explained in the NPRM, the ability of incumbent LECs to impose resale restrictions and conditions is likely to be evidence of market power and may reflect an attempt by incumbent LECs to preserve their market position. In a competitive market, an individual seller (an incumbent LEC) would not be able to impose significant restrictions and conditions on buyers because such buyers turn to other sellers. Recognizing that incumbent LECs possess market power, Congress prohibited unreasonable restrictions and conditions on resale. We, as well as state commissions, are unable to predict every potential restriction or limitation an incumbent LEC may seek to impose on a reseller. Given the probability that restrictions and conditions may have anticompetitive results, we conclude that it is consistent with the procompetitive goals of the 1996 Act to presume resale restrictions and conditions to be unreasonable and therefore in violation of section 251(c)(4). This presumption should reduce unnecessary burdens on resellers seeking to enter local exchange markets, which may include small entities, by reducing the time and expense of proving affirmatively that such restrictions are unreasonable.[2219] We discuss several specific restrictions below including certain restrictions for which we conclude the presumption of unreasonableness shall not apply. We also discuss certain restrictions that we will presume are reasonable.

2. Promotions and Discounts

a. Background and Comments

940. In the NPRM, we asked whether an incumbent LEC's obligation to make their services available for resale at wholesale rates applies to discounted and promotional offerings and, if so, how.[2220] We also asked, if the wholesale pricing obligation applies to promotions and discounts, whether the reseller entrant's customer must take service pursuant to the same restrictions that apply to the incumbent LEC's retail customers.[2221]

[2219] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

[2220] NPRM at para. 175.

[2221] *Id.*

941. Incumbent LECs and Time Warner argue that they should not be required to offer discounted and promotional offerings at wholesale rates.[2222] These parties argue that promotions and discounts are merely subsets of standard offerings, or that promotions and discounts are only devices for marketing underlying "telecommunications services."[2223] Thus, these parties argue, a discounted and promotional offering is not in itself a "telecommunications service" that is subject to the resale requirement as long as the standard offering is made available for resale at wholesale rates.[2224]

942. Incumbent LECs argue that requiring promotions and discounts to be made available at wholesale rates will discourage such offerings. According to incumbent LECs, promotions and discounts serve as a means by which incumbent LECs differentiate their services from resellers' offerings.[2225] Furthermore, they contend that establishing a system where resellers' service and pricing options track incumbent LECs' promotions and discounts would promote collusion rather than competition.[2226] SBC notes that resellers will have access to volume discounts (through aggregating) that will allow them to compete with promotions and discounts offered by incumbent LECs.[2227] Incumbent LECs argue that many promotions, such as offering installation at no charge for new customers for limited periods, are short-term and used as marketing tools.[2228] Some parties suggest that the wholesale rate obligation should, at least, not attach to offerings that are only available for a limited period of time.[2229] Specifically, some parties recommend that we not permit incumbent LECs not to offer wholesale rates for offerings that are only available for 120 days or less.[2230]

[2222] *See, e.g.,* Ameritech comments at 57; Bell Atlantic comments at 46; MECA comments at 60; NYNEX comments at 76; SNET comments at 34; Time Warner comments at 73; U S West comments at 67; USTA comments at 72. Some parties commented only with respect to promotional offerings*See, e.g.,* BellSouth comments at 66; Cincinnati Bell comments at 34; PacTel comments at 87; SBC comments at 72.

[2223] *See, e.g.*, Ameritech comments at 57; NYNEX comments at 76.

[2224] *See, e.g.*, Bell Atlantic reply at 23-24; GTE comments at 50; MECA comments at 60; NYNEX comments at 76; Time Warner comments at 73.

[2225] *See, e.g.*, BellSouth comments at Attachment (Interconnection and Economic Efficiency), p. 22; Cincinnati Bell comments at 33; USTA comments at Attachment (Affidavit of Jerry Hausman), p.14.

[2226] GTE comments at 50.

[2227] SBC comments at 72-73.

[2228] *See, e.g.*, NYNEX comments at 76 (promotions are merely short term waivers of nonrecurring charges).

[2229] Ameritech comments at 56-57; GTE reply at 27 n.49; Ohio Consumer's Counsel comments at 36; PacTel reply at 45.

[2230] *See, e.g.*, Ameritech comments at 57.

943. Some parties also contend that section 251(c)(4) resale obligations should not apply to contract,[2231] trial,[2232] or community service offerings.[2233] GTE and U S West argue that high volume rate offerings should not be subject to the wholesale rate obligation because they are already discounted.[2234] Ameritech and Bell Atlantic argue that contract offerings are not subject to resale because they are not made generally available.[2235]

944. IXCs, resellers, and DoJ argue that if incumbent LECs are not required to offer promotions and other discounts at wholesale rates, incumbent LECs will be able to undercut rates that resellers offer.[2236] They contend that services, classes of customers, or even individual customers could be strategically targeted by the incumbent LECs.[2237] The Telecommunications Resellers Association and others argue that price reductions that are designed to drive competitors from the market do not produce long-term gains for consumers.[2238] The Ohio Consumers' Counsel argues that, if the Commission were to exempt short-term promotional offerings, 120 days is too long to be considered short-term.[2239] IXCs and resellers contend that contract offerings should be made available for resale.[2240]

945. Incumbent LECs, some state commissions, and the Ohio Consumers' Counsel argue that if promotions and discounts are subject to wholesale pricing, reseller end-users must take such promotions

[2231] BellSouth comments at 66; USTA comments at 72.

[2232] Bell Atlantic reply at 23-24; SBC comments at 71; USTA comments at 72.

[2233] J. Staurulakis comments at 7. LDDS advocates that resale of community service offerings be limited to the class of subscribers eligible to receive such offerings. LDDS comments at 84.

[2234] GTE comments at 49-50; U S West comments at 68.

[2235] Ameritech reply at 47; Bell Atlantic reply at 24.

[2236] *See, e.g.*, AT&T comments at 83; Cable & Wireless comments at 37; Telecommunications Resellers Ass'n reply at 13; DoJ comments at 54-55. For this reason, the Washington Commission made its support of promotional and discount resale restrictions contingent on rules that would prevent incumbent LECs from pricing such offerings below rates offered to resellers. Washington Commission comments at 32.

[2237] *See, e.g.*, Telecommunications Resellers Ass'n reply at 13.

[2238] Telecommunications Resellers Ass'n reply at 13.

[2239] Ohio Consumers' Counsel reply at 30.

[2240] *See, e.g.*, LDDS reply at 43; Telecommunications Resellers Ass'n reply at 14.

and discounts under the same conditions as incumbent LEC end users.[2241] Resellers argue, however, that incumbent LECs will use this latitude to engage in anticompetitive practices by creating conditions that will have an unnecessarily greater impact on typical reseller end users than incumbent LEC end users.[2242]

946. Incumbent LECs also seek to limit reseller end user eligibility to purchase resold incumbent LEC high-volume offerings to those eligible to receive such offerings directly from the incumbent LEC.[2243] Such a limitation would prevent high-volume services from being resold to low-volume customers. MFS argues that such restrictions should be considered per se unreasonable because this is a significant source of the resellers' competitive advantage.[2244] The Ohio and Pennsylvania Commissions also support resellers' rights to aggregate low volume customers to take advantage of the resulting buying power.[2245]

947. U S West generally argues that resellers should make the same type of purchasing commitments made by current purchasers of wholesale services.[2246] Often, U S West argues, wholesalers are required to concentrate their purchases on services from a limited number of switches in order to receive volume discounts. U S West argues that incumbent LECs should be allowed to require the same types of commitments from resellers purchasing such services.[2247] U S West and GTE propose allowing incumbent LECs to impose term requirements on resold offerings.[2248] Cable & Wireless opposes both of these requirements and suggests that they be made presumptively unreasonable.[2249]

[2241] *See*, *e.g.*, SBC reply at 15 n.34, PacTel comments at 45 n.95; Alabama Commission comments at 26; Ohio Consumers' Counsel comments at 35-36.

[2242] *See*, *e.g.*, Cable & Wireless comments at 42; Telecommunications Resellers Ass'n comments at 19 n.50.

[2243] *See*, *e.g.*, GTE comments at 49-50; California Commission comments at 35-37; PacTel reply at 45 n.95.

[2244] MFS comments at 70.

[2245] Ohio Commission comments at 65; Pennsylvania Commission comments at 36. The Ohio Commission, however, specifically states that it is opposed to federal rules on this subject. Ohio Commission at 65.

[2246] U S West comments at 67.

[2247] *Id*.

[2248] U S West comments at 67; GTE comments at 47.

[2249] Cable & Wireless comments at 48-49.

b. Discussion

948. Section 251(c)(4) provides that incumbent LECs must offer for resale at wholesale rates "any telecommunications service" that the carrier provides at retail to noncarrier subscribers. This language makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings. We therefore conclude that no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs. A contrary result would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act. In discussing promotions here, we are only referring to price discounts from standard offerings that will remain available for resale at wholesale rates, *i.e.*, temporary price discounts.[2250]

949. There remains, however, the question of whether all short-term promotional prices are "retail rates" for purposes of calculating wholesale rates pursuant to section 252(d)(3). The 1996 Act does not define "retail rate;" nor is there any indication that Congress considered the issue. In view of this ambiguity, we conclude that "retail rate" should be interpreted in light of the pro-competitive policies underlying the 1996 Act. We recognize that promotions that are limited in length may serve procompetitive ends through enhancing marketing and sales-based competition and we do not wish to unnecessarily restrict such offerings. We believe that, if promotions are of limited duration, their procompetitive effects will outweigh any potential anticompetitive effects. We therefore conclude that short-term promotional prices do not constitute retail rates for the underlying services and are thus not subject to the wholesale rate obligation.

950. We must also determine when a promotional price ceases to be "short term" and must therefore be treated as a retail rate for an underlying service. Incumbent LEC commenters support 120 days as the maximum period for such promotions. This has been criticized as being too long. We are concerned that excluding promotions that are offered for as long as four months may unreasonably hamper the efforts of new competitors that seek to enter local markets through resale. We believe that promotions of up to 90 days, when subjected to the conditions outlined below, will have significantly lower anticompetitive potential, especially as compared to the potential procompetitive marketing uses of such promotions. We therefore establish a presumption that promotional prices offered for a period of 90 days or less need not be offered at a discount to resellers. Promotional offerings greater than 90 days in duration must be offered for resale at wholesale rates pursuant to section 251(c)(4)(A). To preclude the potential for abuse of promotional discounts, any benefit of the promotion must be realized within the time period of the promotion, *e.g.*, no benefit can be realized more than ninety days after the promotional offering is taken by the customer if the promotional offering was for ninety days. In addition, an incumbent LEC may not use promotional offerings to evade the wholesale obligation, for example by consecutively offering a series of 90-day promotions.

[2250] Limited time offerings of service are still subject to resale pursuant to *supra* Section VIII.A.

951. We find unconvincing the arguments that the offerings under section 251(c)(4) should not apply to volume-based discounts. The 1996 Act on its face does not exclude such offerings from the wholesale obligation. If a service is sold to end users, it is a retail service, even if it is priced as a volume-based discount off the price of another retail service. The avoidable costs for a service with volume-based discounts, however, may be different than without volume contracts.

952. We are concerned that conditions that attach to promotions and discounts could be used to avoid the resale obligation to the detriment of competition. Allowing certain incumbent LEC end user restrictions to be made automatically binding on reseller end users could further exacerbate the potential anticompetitive effects. We recognize, however, that there may be reasonable restrictions on promotions and discounts. We conclude that the substance and specificity of rules concerning which discount and promotion restrictions may be applied to resellers in marketing their services to end users is a decision best left to state commissions, which are more familiar with the particular business practices of their incumbent LECs and local market conditions. These rules are to be developed, as necessary, for use in the arbitration process under section 252.

953. With respect to volume discount offerings, however, we conclude that it is presumptively unreasonable for incumbent LECs to require individual reseller end users to comply with incumbent LEC high-volume discount minimum usage requirements, so long as the reseller, in aggregate, under the relevant tariff, meets the minimal level of demand. The Commission traditionally has not permitted such restrictions on the resale of volume discount offers.[2251] We believe restrictions on resale of volume discounts will frequently produce anticompetitive results without sufficient justification. We, therefore, conclude that such restrictions should be considered presumptively unreasonable. We note, however, that in calculating the proper wholesale rate, incumbent LECs may prove that their avoided costs differ when selling in large volumes.

3. Below-Cost and Residential Service

a. Background and Comments

954. Responding to our general questions regarding the scope of limitations that may be placed on competitors' resale of incumbent LEC services,[2252] parties addressed in their comments whether below-cost and residential services are subject to section 251(c)(4). Generally, those arguing against application

[2251] *See, e.g., Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, Docket No. 20097, Report and Order, 60 FCC 2d 261, 308-16 (1976) (divisions of full time private line circuits will enable smaller users to make efficient, discrete use of private line offerings, and such advantages will be in terms of cost savings and selectivity rather than technical advantages).

[2252] NPRM at para. 175.

of the wholesale discount also argue against requiring or even allowing resale of below-cost services. Incumbent LECs, including small incumbent LECs serving higher cost areas, and some state commissions argue that restrictions on resale of below-cost services are permissible.[2253] They argue that these services are often funded through internal subsidies that diminish with the onset of competition.[2254] GTE argues that there simply are no costs to avoid where below-cost services are offered at wholesale.[2255] GTE and PacTel argue that, if we were to apply wholesale pricing to services offered below cost, we should delay doing so until states have had the opportunity to rebalance rates.[2256]

955. Potential competitors, primarily IXCs, argue that incumbent LEC losses will not be increased as a result of resale of these services, even at a discount, so long as the services are only sold to the same class of customers to whom the incumbent LEC's offering is available.[2257] Jones Intercable further argues that not allowing resellers to "serve" customers currently subscribing to below-cost service violates the universal service provisions of the 1996 Act.[2258] The Telecommunications Resellers Association notes that establishing rules based on whether a service is offered below, at, or above cost will invite lengthy regulatory disputes.[2259] Additionally, TCC points out that incumbent LECs will continue to receive access revenue even from resold service and such revenue will continue to subsidize such services.[2260]

[2253] *See, e.g.*, MECA comments at 60; SBC comments at 71-72; SNET comments at 31-32; U S West comments at 67; GTE comments at 46 (acknowledging, however, that its position on this might change depending on the outcome of universal service reform); Oregon Commission comments at 31. Additionally, incumbent LECs argue that steps should be taken to ensure that the underlying provider of the service continues to receive universal service payments. *See, e.g.*, NYNEX comments at 84.

[2254] SNET comments at 31-32. Bell Atlantic argues that this might even be considered an unconstitutional taking. Bell Atlantic reply at Attachment 2 (Epstein Declaration), p. 7.

[2255] GTE comments at 46.

[2256] PacTel reply at 44; GTE reply at 26-27.

[2257] *See, e.g.*, AT&T comments at 80; California Commission reply at 21-22; Competition Policy Institute comments at 24; GCI comments at 1, 14; LDDS comments at 84; MCI comments at 89; Sprint reply at 35-37; TCC comments at 44 n.44; Telecommunications Resellers Ass'n reply at 15.

[2258] Jones Intercable comments at 32-33.

[2259] Telecommunications Resellers Ass'n reply at 15.

[2260] TCC comments at 44 n.44.

b. Discussion

956. Subject to the cross-class restrictions discussed below, we believe that below-cost services are subject to the wholesale rate obligation under section 251(c)(4). First, the 1996 Act applies to "any telecommunications service" and thus, by its terms, does not exclude these types of services. Given the goal of the 1996 Act to encourage competition, we decline to limit the resale obligation with respect to certain services where the 1996 Act does not specifically do so. Second, simply because a service may be priced at below-cost levels does not justify denying customers of such a service the benefits of resale competition. We note that, unlike the pricing standard for unbundled elements, the resale pricing standard is not based on cost plus a reasonable profit. The resale pricing standard gives the end user the benefit of an implicit subsidy in the case of below-cost service, whether the end user is served by the incumbent or by a reseller, just as it continues to take the contribution if the service is priced above cost. So long as resale of the service is generally restricted to those customers eligible to receive such service from the incumbent LEC, as discussed below, demand is unlikely to be significantly increased by resale competition. Thus, differences in incumbent LEC revenue resulting from the resale of below-cost services should be accompanied by proportionate decreases in expenditures that are avoided because the service is being offered at wholesale.

957. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, MECA argues that services incumbent LECs offer at below cost rates should not be subject to resale under section 251(c)(4). We do not adopt MECA's proposal. As explained above, we conclude that the 1996 Act provides that below-cost services are subject to the section 251(c)(4) resale obligation and that differences in incumbent LEC revenue resulting from the resale of below-cost services should be accompanied by decreases in expenditures that are avoided because the service is being offered at wholesale. Therefore, resale of below-cost services at wholesale rates should not adversely impact small incumbent LECs.[2261] We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act.

4. Cross-Class Selling

a. Background

958. In the NPRM, we sought comment on the meaning of section 251(c)(4)(B) which provides that "[a] State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at

[2261] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

retail only to a category of subscribers from offering such service to a different category of subscribers."[2262] We suggested that competing telecommunications carriers should not be allowed to purchase a subsidized service that is offered to a specific category of subscribers and then resell such service to other customers. We tentatively concluded, for example, that it might be reasonable for a state to restrict the resale of a residential exchange service that is limited to low-income consumers, such as the existing Lifeline program.[2263] We noted that we have generally not allowed carriers to prevent other carriers from purchasing high-volume, low-price offerings to resell to a broad pool of lower volume customers.[2264] Similarly, we inquired into the propriety of practices such as limiting the resale of flat-rated service.[2265]

b. Comments

959. There is a general consensus among incumbent LECs, IXCs, and others that resale of residential service should be limited to customers eligible to take such service from the incumbent LEC under section 251(c)(4)(B).[2266] There is a similar consensus that resale of Lifeline service should be limited to those eligible to receive such service from the incumbent LEC.[2267] Some argue that section 251(c)(4)(B) is only applicable to classes of subscribers whose service is explicitly subsidized or provided at below-cost rates and that broader cross-class restrictions should be considered unreasonable.[2268] Ohio Consumers' Counsel argues that residential services that may be offered above cost are still offered at a lower profit margin than business services for public policy reasons, justifying the inclusion of all residential services in the scope of section 251(c)(4)(B).[2269]

[2262] NPRM at para. 176.

[2263] *Id.*

[2264] *Id.*

[2265] This practice of limiting the resale of flat-rated services was listed as an example of state practices on which we sought comment in the NPRM at para. 177.

[2266] *See, e.g.*, ACTA comments at 25; Ameritech comments at 54; California Commission comments at 35-37; CFA/CU comments at 16; Comptel reply at 43 n.114; GTE comments at 49-50; GVNW comments at 39; Illinois Ind. Tel. Ass'n comments at 6; MCI comments at 89; NCTA comments at 57; PacTel comments at 87; Sprint comments at 70. Texas Public Utility Counsel argues that the residential cross class selling restrictions should merely prohibit the resale of flat-rated residential service to business customers. Texas Public Utility Counsel comments at 44-45.

[2267] *See, e.g.*, California Commission comments at 36-37; LDDS comments at 84; NYNEX comments at 80.

[2268] *See, e.g.*, AT&T reply at 38-39; DOJ comments at 54; Telecommunications Resellers Association comments at 17 n.46.

[2269] Ohio Consumers' Counsel comments at 36.

960. NYNEX and the Massachusetts Commission argue that incumbent LECs may prohibit the resale of flat-rated services.[2270] They argue that resale of services to multiple-use customers would be unfair to incumbent LECs. National Private Telecommunications Association and Jones Intercable advocate that incumbent LECs should not be allowed to impose resale restrictions that would prevent the offering of shared tenant services operations. Shared tenant services operations involve using trunking to serve multiple unit dwellings with fewer lines than would be needed if each unit separately subscribed to service directly from the incumbent LEC.[2271]

961. Finally, some parties express concern that incumbent LECs will create multitudes of classes in order to prevent resellers, as a practical matter, from competing to provide such services and recommend that any new classes be presumed unreasonable.[2272]

c. Discussion

962. There is general agreement that residential services should not be resold to nonresidential end users, and we conclude that restrictions prohibiting such cross-class reselling of residential services are reasonable. We conclude that section 251(c)(4)(B) permits states to prohibit resellers from selling residential services to customers ineligible to subscribe to such services from the incumbent LEC. For example, this would prevent resellers from reselling wholesale-priced residential service to business customers. We also conclude that section 251(c)(4)(B) allows states to make similar prohibitions on the resale of Lifeline or any other means-tested service offering to end users not eligible to subscribe to such service offerings. State commissions have established rate structures that take into account certain desired balances between residential and business rates and the goal of maximizing access by low-income consumers to telecommunications services. We do not wish to disturb these efforts by prohibiting or overly narrowing state commissions' ability to impose such restrictions on resale.

963. Shared tenant services are made possible through the resale and trunking of flat-rated services to multiple customers. We do not believe that these or other efficient uses of technology should be discouraged through restrictions on the resale of flat-rated offerings to multiple end users, even if incumbent LECs have not always priced such offerings assuming these usage patterns. We therefore conclude that such restrictions are presumptively unreasonable.

[2270] NYNEX comments at 80; Mass. Commission comments at 5; MECA comments at 61.

[2271] National Private Telecommunications Ass'n reply at 4-5; Jones Intercable reply at 27.

[2272] CompTel comments at 102.

964. We also conclude that all other cross-class selling restrictions should be presumed unreasonable. Without clear statutory direction concerning potentially allowable cross-class restrictions, we are not inclined to allow the imposition of restrictions that could fetter the emergence of competition. As with volume discount and flat-rated offerings, we will allow incumbent LECs to rebut this presumption by proving to the state commission that the class restriction is reasonable and nondiscriminatory.

5. Incumbent LEC Withdrawal of Services

a. Background

965. In the NPRM, we sought comment on whether an incumbent LEC can avoid making a service available at wholesale rates by ceasing to offer the retail service on a retail basis, or whether the incumbent should first be required to make a showing that withdrawing the offering is in the public interest or that competitors will continue to have an alternative way of providing service. We also asked if access to unbundled elements addresses the concern that incumbent LECs could withdraw retail services.[2273]

b. Comments

966. A number of large incumbent LECs and USTA argue that incumbent LECs should be allowed to withdraw services unilaterally and unconditionally.[2274] These parties argue that they have the right to make their own business decisions and the right to terminate the offering of a service that they feel is unprofitable.[2275] Some potential competitors also supported the ability of incumbent LECs to withdraw service, but explicitly conditioned such support on bilateral "grandfathering" of existing customers, *i.e.*, allowing current end users of the terminated service to continue to purchase the service at least for a limited time.[2276] These services then would not be required to be offered for resale because they are no longer offered to the public.[2277] Thus, these parties argue that there would be a permissible restriction on the resale of "grandfathered" services permitting resale only to "grandfathered" customers. Some incumbent LECs suggest that potential concerns over incumbent LEC withdrawal of service would be eliminated if both resellers and incumbent LECs could compete for grandfathered customers.[2278]

[2273] NPRM at para. 175.

[2274] *See, e.g.*, Ameritech comments at 54-55; GTE comments at 48; SBC comments at 73.

[2275] *See, e.g.*, Ameritech reply at 48; GTE comments at 48-49; MECA comments at 60-61.

[2276] *See, e.g.*, Cable & Wireless comments at 42-43.

[2277] *See, e.g.*, SBC comments at 73; J. Staurulakis comments at 5-6.

[2278] Ameritech reply at 49; NYNEX reply at 37.

967. Several commenters, primarily IXCs, resellers, and state commissions, expressed concern about the incumbent LECs' ability to circumvent resale obligations by withdrawing services that resellers are able to use to compete effectively.[2279] IXCs, resellers, some state commissions, and others argue that unilateral withdrawals of service should be considered presumptively unreasonable.[2280] Several commenters discuss U S West's attempted withdrawal of Centrex service, a small business service that resellers frequently wish to purchase to compete with incumbent LECs, as an example of such behavior.[2281] Others ask us to require that there be a substitutable alternative to a withdrawn service before it could be withdrawn.[2282] The Telecommunications Resellers Association and Cable & Wireless argue that even the existence of a competitive alternative is not sufficient to prevent anticompetitive behavior because such a standard represents an open invitation to strategic manipulation of service offerings and pricing.[2283] Both the Ohio Commission and the Competition Policy Institute argue that access to unbundled elements does not alleviate concerns about incumbent LEC withdrawal of service offerings.[2284]

c. Discussion

968. We are concerned that the incumbent LECs' ability to withdraw services may have anticompetitive effects where resellers are purchasing such services for resale in competition with the incumbent. We decline to issue general rules on this subject because we conclude that this is a matter best left to state commissions. Many state commissions have rules regarding the withdrawal of retail services and have experience regulating such matters. States can assess, for example, the universal service implications of an incumbent LEC's proposal to withdraw a retail service. Therefore, we conclude that our general presumption that incumbent LEC restrictions on resale are unreasonable does not apply to incumbent LEC withdrawal of service. States must ensure that procedural mechanisms exist for processing

[2279] *See*, *e.g*., ACTA comments at 9; AT&T reply 37-38; CompTel comments at 101; DOJ comments at 55; Florida Commission comments at 36; MCI comments at 85; Sprint reply at 35-37; Telecommunications Resellers Ass'n comments 18-19.

[2280] *See*, *e.g*., AT&T reply at 37-38; Cable & Wireless comments at 43; Ohio Commission comments at 63-64; Pennsylvania Commission comments at 36; Washington Commission comments at 32-33; ASCI comments at 59-60; Competition Policy Institute comments at 25.

[2281] *See*, *e.g*., ACTA comments at 9; MCI comments at 87-88; TCC comments at 44.

[2282] Competition Policy Institute comments at 25; GST comments at 32; MFS comments at 71-72; Ohio Commission comments at 65. MCI and Frontier propose that a showing that there is no demand for a service would also be sufficient. MCI comments at 88; Frontier comments at 28. DoJ argues that unilateral withdrawal should only be allowed if the service is shown to be obsolete. DoJ comments at 55-56.

[2283] Telecommunications Resellers Ass'n comments at 19 n.49; Cable & Wireless comments at 43.

[2284] Ohio Commission comments at 64; Competition Policy Institute comments at 26.

complaints regarding incumbent LEC withdrawals of services. We find it important, however, to ensure that grandfathered customers -- subscribers to the service being withdrawn who are allowed by an incumbent LEC to continue purchasing services -- not be denied the benefits of competition. We conclude that, when an incumbent LEC grandfathers its own customers of a withdrawn service, such grandfathering should also extend to reseller end users. For the duration of any grandfathering period, all grandfathered customers should have the right to purchase such grandfathered services either directly from the incumbent LEC or indirectly through a reseller.[2285] The incumbent LEC shall offer wholesale rates for such grandfathered services to resellers for the purpose of serving grandfathered customers.

6. Provisioning

a. Comments

969. Resellers and IXCs express concern that incumbent LECs are not making, and will not make, services available for resale in a timely manner or fail to provide a minimal level of operational support and service quality.[2286] Such resellers and IXCs also argue that incumbent LEC claims of capacity shortages should not excuse failures to provide timely service or to treat resellers on an equal basis with other incumbent LEC customers.[2287] Cable & Wireless argues that customer changeover charges should not be allowed to exceed the same Primary Interexchange Carrier ("PIC") charge that is imposed when customers switch from one IXC to another.[2288] TCC proposes a set of rules regarding nondiscriminatory treatment of resellers and reporting requirements to implement such rules.[2289] These rules include provision of unbranded or rebranded operator and directory assistance services, a proposal also supported by AT&T, TCC, and ACSI.[2290] Incumbent LECs argue that refusing to build out their networks to handle reseller requests when they lack capacity is a reasonable course of action to prevent stranded investment should the reseller eventually build facilities of its own.[2291]

[2285] *See Petition for a Total Local Exchange Wholesale Service Tariff from Illinois Bell Telephone Company*, Nos. 95-0458 and 95-0531 (consol.) (Illinois Commission June 26, 1996) at 38.

[2286] *See, e.g.*, Telecommunications Resellers Ass'n comments at 20-23; MCI comments at 88-89.

[2287] *See, e.g.*, Telecommunications Resellers Ass'n reply at 16 n.34; LDDS reply at 43.

[2288] Cable & Wireless comments at 49-50.

[2289] *See* TCC reply at 29-33.

[2290] *See* AT&T comments at 81 n.123; TCC reply at 31; ACSI comments at 47-48.

[2291] *See, e.g.*, U S West comments, Exhibit A (Federal Implementation of the Telecommunications Act of 1996) at 25-26. Incumbent LECs argue that they should be able to require minimum volume and term discounts if they must build out facilities. *See* Ameritech at 54; MECA comments at 60.

b. Discussion

970. We conclude that service made available for resale be at least equal in quality to that provided by the incumbent LEC to itself or to any subsidiary, affiliate, or any other party to which the carrier directly provides the service, such as end users. Practices to the contrary violate the 1996 Act's prohibition of discriminatory restrictions, limitations, or prohibitions on resale. This requirement includes differences imperceptible to end users because such differences may still provide incumbent LECs with advantages in the marketplace. Additionally, we conclude that incumbent LEC services are to be provisioned for resale with the same timeliness as they are provisioned to that incumbent LEC's subsidiaries, affiliates, or other parties to whom the carrier directly provides the service, such as end users. This equivalent timeliness requirement also applies to incumbent LEC claims of capacity limitations and incumbent LEC requirements relating to such limitations, such as potential down payments. We note that common carrier obligations, established by federal and state law and our rules, continue to apply to incumbent LECs in their relations with resellers. With regard to customer changeover charges, we conclude that states should determine reasonable and nondiscriminatory rates for such charges.

971. Brand identification is likely to play a major role in markets where resellers compete with incumbent LECs for the provision of local and toll service. This brand identification is critical to reseller attempts to compete with incumbent LECs and will minimize consumer confusion. Incumbent LECs are advantaged when reseller end users are advised that the service is being provided by the reseller's primary competitor. We therefore conclude that where operator, call completion, or directory assistance service is part of the service or service package an incumbent LEC offers for resale, failure by an incumbent LEC to comply with reseller branding requests presumptively constitutes an unreasonable restriction on resale. This presumption may be rebutted by an incumbent LEC proving to the state commission that it lacks the capability to comply with unbranding or rebranding requests. We recognize that an incumbent LEC may incur costs in complying with a request for unbranding or rebranding. Because we do not have a record on which to determine the level of fees or wholesale pricing offsets that may reasonably be assessed to recover these costs, we leave such determinations to the state commissions.

D. Resale Obligations of LECs Under Section 251(b)(1)

972. Section 251(b)(1) imposes a duty on all LECs to offer certain services for resale. Specifically, section 251(b)(1) requires LECs "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services."[2292]

[2292] 47 U.S.C. § 251(c)(4).

1. Background

973. In the NPRM, we sought comment generally on the relationship of section 251(b)(1) to section 251(c)(4).[2293] We sought comment on whether all LECs are prohibited from imposing unreasonable restrictions on resale of their services, but only incumbent LECs that provide retail services to subscribers that are not telecommunications carriers are required to make such services available at wholesale rates to requesting telecommunications carriers.[2294] We also sought comment on what types of resale restrictions should be permitted under section 251(b)(1) and stated our belief that few, if any, conditions or limitations should be permitted for the same reasons that resale restrictions are sharply limited under section 251(c)(4).[2295] We also asked what standards should be adopted for determining whether resale restrictions should be permitted, and whether presumptions should be established.[2296]

2. Comments

974. A variety of commenters, including Cable & Wireless, Teleport, and several state commissions, support the view that wholesale pricing does not apply to nonincumbent LECs.[2297] A similar group of parties argue that the prohibition on unreasonable or discriminatory resale restrictions applies to nonincumbent LECs.[2298] The Ohio Consumers' Counsel contends that although nothing in section 251 requires states to create wholesale pricing for section 251(b)(1) resale, nothing in the 1996 Act prevents imposition of such pricing.[2299]

975. The Telecommunications Resellers Association argues that all resale restrictions by all LECs should be presumed unreasonable.[2300] MFS and Citizens Utilities contend that resale restrictions in sections

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[2293] NPRM at para. 173.

[2294] *Id.* at para. 174.

[2295] *Id.*

[2296] *Id.* at para. 197.

[2297] *See, e.g.*, Cable & Wireless comments at 38 n.68; Teleport comments at 55; Pennsylvania Commission comments at 35.

[2298] Ohio Commission comments at 60-61; Pennsylvania Commission comments at 35; Teleport comments at 55; Cincinnati Bell comments at 31.

[2299] Ohio Consumers' Counsel comments at 35.

[2300] Telecommunications Resellers Ass'n comments at 53.

251(b)(1) and 251(c)(4)(B) should be interpreted in the same way.[2301] MFS and GST both argue that any restriction of a type that has been found reasonable for incumbent LECs should be presumed reasonable for all other LECs.[2302] NCTA asserts that new competitors have a great incentive to minimize costs, which will often involve using resellers for distribution purposes.[2303] They argue that to ensure that the resale obligations of entrants do not adversely impact their ability to engage in facilities-based competition with incumbent LECs, the Commission should defer the duty of facilities-based competitors to engage in resale.[2304]

3. Discussion

976. There are two differences between the resale obligations in section 251(b)(1) and in section 251(c)(4): the scope of services that must be resold and the pricing of such resale offerings. Section 251(b)(1) requires resale of all telecommunications services offered by the carrier while section 251(c)(4) only applies to telecommunications services that the carrier provides at retail to subscribers who are not telecommunications carriers. Thus, the scope of services to which section 251(b)(1) applies is larger and necessarily includes all services subject to resale under section 251(c)(4). We need not prescribe a minimum list of services that are subject to the 251(b)(1) resale requirement for the same reasons that we specified for not prescribing such a list in Section VIII.A. of this Order. We note that section 251(b)(1) clearly omits a wholesale pricing requirement. We therefore conclude that the 1996 Act does not impose wholesale pricing requirements on nonincumbent LECs. Nonincumbent LECs definitionally lack the market power possessed by incumbent LECs[2305] and were therefore not made subject to the wholesale pricing obligation in the 1996 Act. Their wholesale rates will face competition by incumbent LECs, making a wholesale pricing requirement for nonincumbent LECs unnecessary.

977. Sections 251(b)(1) and 251(c)(4) contain the same statutory standards regarding resale restrictions. Therefore, we conclude that our rules concerning resale restrictions under section 251(b)(1), such as the general presumption that all resale restrictions are unreasonable, should be the same as under section 251(c)(4). We conclude that any restriction of a type that has been found reasonable for incumbent LECs should be deemed reasonable for all other LECs as well.

[2301] MFS comments at 69; Citizens Utilities comments at 27.

[2302] MFS comments at 75-76; GST comments at 33.

[2303] NCTA comments at 20-21.

[2304] *Id*. at 21.

[2305] *See* 47 U.S.C. § 251(h)(2).

E. Application of Access Charges

1. Background

978. In the NPRM, we suggested that an entrant that merely resold a bundled retail service purchased at wholesale rates would not receive access revenues.[2306] In other words, IXCs must still pay access charges to incumbent LECs for originating and terminating interstate traffic of an end user served by a telecommunications carrier that resells incumbent LEC services under section 251(c)(4).

2. Comments

979. Parties that commented on this issue generally agree with our analysis in the NPRM. Some commenters argue that incumbent LECs, including small incumbent LECs, should continue to receive access charge revenues when resellers purchase wholesale services under section 251(c)(4).[2307] The Rural Telephone Coalition argues that retail local service rates, upon which wholesale rates will be based, have been developed with the assumption that incumbent LECs will receive access charge revenues.[2308] The Wisconsin Commission points out that Wisconsin law currently prevents resale of access services performed by at least small LECs.[2309] On the other hand, the Texas Office of Public Utility Counsel asserts that switched access services are offered to end users and should be subject to resale.[2310] While they did not explicitly address the issue, some potential competitors alluded to their assumptions that such access charges would continue to be retained by the incumbent LEC.[2311]

3. Discussion

980. We conclude that the 1996 Act requires that incumbent LECs continue to receive access charge revenues when local services are resold under section 251(c)(4). IXCs must still pay access charges to incumbent LECs for originating or terminating interstate traffic, even when their end user is served by a telecommunications carrier that resells incumbent LEC retail services. Resale, as defined in

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[2306] NPRM at para. 186.

[2307] Rural Tel. Coalition comments at 20; Citizens Utilities comments at 25; J. Staurulakis comments at 6.

[2308] Rural Tel. Coalition comments at 20. USTA makes a similar point, and emphasizes that incumbent LECs should continue to recover the SLC under these circumstances. USTA reply at 31.

[2309] Wisconsin Commission comments at Attachment, pp. 7-8.

[2310] Texas Public Utility Counsel reply at 17-18.

[2311] *See, e.g.*, TCC comments at 44 n.44; LDDS comments at 81; LDDS reply at 42, 46.

section 251(b)(1) and 251(c)(4), involves services, in contrast to section 251(c)(3), which governs sale of network elements. New entrants that purchase retail local exchange services from an incumbent LEC at wholesale rates are entitled to resell only those retail services, and not any other services -- such as exchange access -- the LEC may offer using the same facilities. IXCs must therefore still purchase access services from incumbent LECs outside of the resale framework of 251(c)(4), through existing interstate access tariffs.[2312]

981. Most existing interstate access charges are recovered from IXCs, and therefore can easily be recovered by incumbent LECs whether or not the incumbent LEC retains its billing relationship with the end user subscriber. To allow incumbent LECs to continue recovering the subscriber line charge (SLC), however, the mechanism for assessment of the SLC must be modified. The SLC is currently assessed directly on end users as a monthly charge.[2313] When an end user customer receives local exchange service from a reseller, however, the incumbent LEC will have no direct commercial relationship with that end user. Because the end user would not be a customer of the incumbent LEC, the incumbent LEC could not bill SLC directly to the end user as specified under our existing rules.

982. In March 1995, in the *Rochester Waiver Order*, we granted Rochester Telephone waivers to permit Rochester Telephone to recover the SLC from carriers that purchase local exchange service for resale, rather than recovering the SLC directly from end users.[2314] In that order, we stated that by offering the local exchange service for resale and by unbundling subscriber lines from other network functions, Rochester Telephone created a situation where it would no longer have a direct relationship with end users, IXCs, or both, and that such a situation was not contemplated when the Commission created the rules governing the recovery of access charges. We also permitted Rochester Telephone to bill to resellers the PIC change charge, which is assessed by incumbent local exchange carriers on end users that wish to change their primary interexchange carrier (PIC).

983. The resale requirements of the 1996 Act create a situation for the entire industry that is analogous to the situation Rochester Telephone faced in 1995. We therefore conclude that similar relief is warranted here with respect to the SLC, so that incumbent LECs can recover the SLC from resellers, as we conclude the 1996 Act mandates. Although the PIC change charge is not a part of access charges, and is assessed only when an end user changes his or her primary interexchange carrier, this charge has similar

[2312] As discussed above, a different result occurs in the context of unbundled network elements. Purchasers of unbundled network elements in effect stand in the shoes of the LEC, and are entitled to revenues from all of the services provided using those elements.

[2313] 47 C.F.R. § 69.104.

[2314] *Rochester Telephone Corporation, Petition for Waivers to Implement its Open Market Plan, Order*, 10 FCC Rcd 6776 (1995) (*Rochester Waiver Order*).

characteristics to the SLC and therefore should also be subject to the rule we adopt. Incumbent LECs may assess the SLC and the PIC change charge on telecommunications carriers that resell incumbent LEC services under section 251(c)(4).

984. Although incumbent LECs may continue to recover the SLC when other carriers resell their local exchange services, the SLC is not subject to the wholesale pricing standard of section 252(d)(3). As described above, resellers of local exchange service are not reselling access services; they are purchasing these services from incumbent LECs in the same manner they do today. The SLC is a component of interstate access charges, not of intrastate local service rates. Consistent with the principles of cost-causation and economic efficiency, we have required the portion of interstate allocated loop costs represented by the SLC to be recovered from end users, rather than from carriers as with other access charges. Although the SLC is listed on end user monthly local service bills, this charge does not represent a "telecommunications service [an incumbent LEC] provides at retail to subscribers." Rather, the SLC, like other interstate access charges, relates solely to incumbent LEC interstate access services, which are provided to other carriers rather than retail subscribers and which we have concluded are not subject to the resale requirements of section 251(c)(4). Therefore, the reseller shall pay the SLC to the incumbent LEC for each subscriber taking resold service. The specific SLC that applies depends upon the identity of the end user served by the reselling telecommunications carrier.

IX. DUTIES IMPOSED ON "TELECOMMUNICATIONS CARRIERS" BY SECTION 251(a)

A. Background

985. Section 251(a) imposes two fundamental duties on all telecommunications carriers: (1) "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers;" and (2) "not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to sections 255 or 256."[2315] In this proceeding we determine which carriers are "telecommunications carriers" as defined in section 3(44) of the Act.[2316] In the NPRM, we tentatively concluded that, pursuant to the statute's definition of "telecommunications carrier" and "telecommunications service," to the extent a carrier is engaged in providing for a fee local, interexchange, or international services, directly to the public or to such classes of users as to be effectively available directly to the public, that carrier falls within the definition of "telecommunications carrier." We sought comment on which carriers are included under this definition, and on whether a provider may qualify as a telecommunications carrier for some purposes but not others.[2317]

986. We also tentatively concluded that we should determine whether the provision of mobile satellite services is Commercial Mobile Radio Services (CMRS) or Private Mobile Radio Service (PMRS) based on the factors set forth in the *CMRS Second Report and Order*.[2318] We sought comment on the

[2315] 47 U.S.C. § 251(a). Section 255 addresses access by persons with disabilities and ensures that manufacturers and providers of telecommunications will design equipment and provide service that is accessible to, and usable by, individuals with disabilities. Section 256 provides for coordination for interconnectivity "to promote nondiscriminatory accessibility by the broadest number of users and vendors of communications products and services." 47 U.S.C. §§ 255, 256.

[2316] The term telecommunications carrier means "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage." 47 U.S.C. § 153(44).

[2317] NPRM at para. 246.

[2318] NPRM at para. 247. The Commission makes this determination by looking at an array of public interest considerations (*e.g.*, the types of services being offered and the number of licensees being authorized). *See, e.g.*, *Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for, and To Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services*, GN Docket No. 84-1234, Second Report and Order, 2 FCC Rcd 485, 490 (1987); *Amendment to the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to a Radiodetermination Satellite Service*, GN Docket No. 84-689, Second Report and Order, 104 FCC 2d 650, 665-66 meaning of offering service "directly or indirectly" to the public in the context of section 251(a)(1) and on whether section 251(a) allows non-incumbent LECs discretion to interconnect directly or indirectly with a requesting carrier.[2319] We also sought comment on what other actions we should take to ensure that carriers do not install network features, functions, or capabilities that are inconsistent with guidelines and standards established pursuant to sections 255 and 256.

B. Comments

987. Parties generally agree with our tentative conclusion that, to the extent a carrier is engaged in providing for a fee local, interexchange, or international services, directly to the public or to such classes of users as to be effectively available to the public, that carrier falls within the definition of "telecommunications carrier."[2320] BellSouth claims that the term "telecommunications carrier" should be synonymous with "common carrier."[2321] The Texas Commission argues that the obligations of section 251(a) should apply to all telecommunications carriers -- incumbent LECs and non-incumbent LECs alike.[2322] Metricom argues, however, that because non-dominant carriers lack incentives to deny interconnection to other carriers, the Commission should forbear from imposing any interconnection requirements upon such carriers.[2323] UTC argues that a party must be offering commercial telecommunications services to be a telecommunications carrier.[2324] UTC contends that utilities and other private system operators engage in a cost-sharing for construction and operation of private telecommunications networks. UTC claims that this should not constitute a "fee" in the sense of being a payment for receiving a telecommunications service. UTC further argues that the mere provision of infrastructure, such as "dark fiber" or wholesale capacity, to third-party carriers does not constitute a direct offering to the public, and thus does not qualify carriers offering such

(1986).

[2319] NPRM at para 248.

[2320] *See, e.g.,* Louisiana Commission comments at 21; Illinois Commission comments at 81-82; Pennsylvania Commission comments at 41; BellSouth comments at 75.

[2321] BellSouth comments at 75; COMAV comments at 60; *accord* United Cerebral Palsy Ass'n at 3 and American Foundation for the Blind at 3 (favoring a broad definition of telecommunications carrier that includes any provider of access to any network available to the public).

[2322] Texas Commission comments at 34; NWRA comments at 12-13 (arguing that both facilities based carriers and resellers meet the definition of telecommunications carriers).

[2323] Metricom comments at 3.

[2324] UTC comments at 5-7.

infrastructure as telecommunications carriers under the Act. Several CMRS carriers contend that CMRS providers are telecommunications carriers within the meaning of the Act.[2325]

988. The Illinois Commission argues that, if a company provides both telecommunications and information services, it must be classified as a telecommunications carrier for purposes of section 251.[2326] BellSouth claims, however, that a carrier may be a common carrier for some purposes, but not for others. For example, BellSouth argues that, when a common carrier also provides an information service, it is a common carrier for the provision of the telecommunications service, but a non-common carrier for the provision of the information service.[2327] ATSI contends that enhanced service providers are telecommunications carriers and entitled to the benefits of section 251.[2328]

989. The Illinois Commission argues that the Commission should continue to define mobile satellite service (MSS) as either CMRS or PMRS according to the Commission's factors set forth in the *Second CMRS Report and Order*.[2329] It argues, however, that if an MSS provider offers substitute services for those of a landline LEC, the MSS provider should also be defined as a LEC and treated accordingly under state and federal law.

990. With regard to the phrase "directly or indirectly" in section 251(a), Arch and Sprint argue that the goal is to ensure that all subscribers of one carrier are able to reach all subscribers of other carriers. They claim that this is achieved when two competitors interconnect to an incumbent LEC's network.[2330] Comcast asserts that requiring competitors to interconnect "directly or indirectly" reflects the Act's goal of applying less stringent obligations to carriers lacking market power by enabling competitors to interconnect

[2325] *See, e.g.*, Nextel comments at 6-7; NWRA comments at 12-13; Metricom comments at 1-7; COMAV comments at 60.

[2326] Illinois Commission comments at 81.

[2327] BellSouth comments at 75. UTC claims that only those portions of a Utility's network that is being used in the offering of telecommunications services is subject to the Act's interconnection obligations. Portions that are used on a private basis only are not. Bundling information services with telecommunications services should only create common carrier obligations to the extent that would apply if the telecommunications services were offered by themselves. UTC comments at 9-10.

[2328] ATSI reply at 6 (enhanced service providers (ESPs) must have access to network elements at terms and conditions that allow ESPs to offer competitive services in the marketplace).

[2329] Illinois Commission comments at 81.

[2330] Arch comments at 18; Sprint comments at 89. The parties add that carriers should be permitted, on a voluntary basis, to establish direct interconnection. *Id.*

with other carriers in a cost efficient manner.[2331] The Texas Commission argues that the obligations under section 251(a) should apply to all telecommunications carriers, incumbent and non-incumbents, alike. The Texas Commission claims that, if "non-[incumbent] LECs are allowed the discretion to determine whether to offer direct or indirect connection to another carrier, then the goal of encouraging the most efficient interconnection and thereby bringing the benefits of a competitive market to all consumers will not be realized."[2332]

991. The Commission received few comments on the meaning of section 251(a)(2). Commenters representing individuals with disabilities state that the term "network features, functions, and capabilities" should be defined as broadly as possible to ensure that individuals with disabilities have access to the network.[2333] The American Foundation for the Blind also suggests that any service deployed by a telecommunications carrier, or by a provider connecting to a telecommunications network, and intended for public use should be considered an installation of "features, functions, or capabilities."[2334] The United Cerebral Palsy Associations state that there are currently proceedings underway by both the Commission and by the United States Architectural & Transportation Barriers Compliance Board (Access Board) as part of the section 255 mandate. The United Cerebral Palsy Associations urge the Commission to state that the Commission has the power to enforce both the standards developed in its proceedings and those of the Access Board.[2335]

C. Discussion

992. A "telecommunications carrier" is defined as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226)."[2336] A telecommunications carrier shall be treated as a common carrier under the Act "only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common

[2331] Comcast comments at 16-17.

[2332] Texas Commission comments at 34.

[2333] *See, e.g.*, American Foundation for the Blind comments at 2; United Cerebral Palsy Ass'n comments at 2.

[2334] American Foundation for the Blind comments at 2.

[2335] United Cerebral Palsy Ass'n comments at 2.

[2336] 47 U.S.C. § 153(44). The term "aggregator" is defined as "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services." 47 U.S.C. § 226(a)(2).

carriage."[2337] A "telecommunications service" is defined as the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[2338] We conclude that to the extent a carrier is engaged in providing for a fee domestic or international telecommunications, directly to the public or to such classes of users as to be effectively available directly to the public, the carrier falls within the definition of "telecommunications carrier."[2339] We find that this definition is consistent with the 1996 Act,[2340] and there is nothing in the record in this proceeding that suggests that this definition should not be adopted. Also, enhanced service providers, to the extent that they are providing telecommunications services, are entitled to the rights under section 251(a).

993. We believe, as a general policy matter, that all telecommunications carriers that compete with each other should be treated alike regardless of the technology used unless there is a compelling reason to do otherwise. We agree with those parties that argue that all CMRS providers are telecommunications carriers and are thus obligated to comply with section 251(a).[2341] These carriers meet the definition of "telecommunications carrier" because they are providers of telecommunications services as defined in the 1996 Act and are thus entitled to the benefits of section 251(c), which include the right to request interconnection and obtain access to unbundled elements at any technically feasible point in an incumbent LEC's network. PMRS is defined as any mobile service that is not a commercial service or the functional equivalent of a commercial mobile service.[2342] We conclude that to the extent a PMRS provider uses capacity to provide domestic or international telecommunications for a fee directly to the public, it will fall

[2337] 47 U.S.C. § 153 (44).

[2338] 47 U.S.C. § 153(44). "Telecommunications" is defined in the Act as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

[2339] NPRM at para. 246.

[2340] 47 U.S.C. § 153(44), 153(46).

[2341] The term "CMRS" is defined as "any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public." 47 U.S.C. § 332(d)(1). CMRS includes, among others, some private paging, personal communications services, business radio services, and mobile service that is the functional equivalent of a commercial mobile radio service. 47 C.F.R. § 20.9.

[2342] 47 U.S.C. § 332(d)(3).

within the definition of "telecommunications carrier" under the Act and will be subject to the duties listed in section 251(a).[2343]

994. We conclude that cost-sharing for the construction and operation of private telecommunications networks is not within the definition of "telecommunications services" and thus such operators of private networks are not subject to the requirements of section 251(a). We believe that such methods of cost-sharing do not equate to a "fee directly to the public" under the definition of "telecommunications service."[2344] Conversely, to the extent an operator of a private telecommunications network is offering "telecommunications"[2345] for a fee directly to the public, or to such classes of users as to be effectively available directly to the public (*i.e.*, providing a telecommunications service),[2346] the operator is a telecommunications carrier and is subject to the duties in section 251(a). For example, the furnishing of infrastructure to the public for the provision of telecommunications services (*e.g.*, selling excess capacity on private fiber or wireless networks), constitutes a telecommunications service and thus subjects the operator of such a network to the duties of section 251(a).

995. We conclude that, if a company provides both telecommunications and information services, it must be classified as a telecommunications carrier for purposes of section 251, and is subject to the obligations under section 251(a), to the extent that it is acting as a telecommunications carrier. We also conclude that telecommunications carriers that have interconnected or gained access under sections 251(a)(1), 251(c)(2), or 251(c)(3), may offer information services through the same arrangement, so long as they are offering telecommunications services through the same arrangement as well. Under a contrary conclusion, a competitor would be precluded from offering information services in competition with the incumbent LEC under the same arrangement, thus increasing the transaction cost for the competitor. We find this to be contrary to the pro-competitive spirit of the 1996 Act. By rejecting this outcome we provide competitors the opportunity to compete effectively with the incumbent by offering a full range of services to end users without having to provide some services inefficiently through distinct facilities or agreements. In addition, we conclude that enhanced service providers that do not also provide domestic or international

[2343] The Commission held in the *CMRS Second Report and Order* that any PMRS provider that "employs spectrum for not-for-profit services, such as an internal operation, but also uses its excess capacity to make available a service that is intended to receive compensation, will be deemed to be a 'for profit' service to the extent of such excess capacity activities." *Implementation of Section 3(n) and 332 of the Communications Act*, Second Report and Order, GN Docket No. 93-252, 9 FCC Rcd 1411, 1429 (1994) (*CMRS Second Report and Order*).

[2344] 47 U.S.C. § 153(46).

[2345] The term "telecommunications" means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in form or content of the information as sent and received." 47 U.S.C. § 153(43).

[2346] 47 U.S.C. § 153(46).

telecommunications, and are thus not telecommunications carriers within the meaning of the Act, may not interconnect under section 251.

996. Consistent with our tentative conclusion in the NPRM, we will determine whether the provision of mobile satellite service (MSS) is CMRS (and therefore common carriage) or PMRS based on the factors set forth in the *CMRS Second Report and Order.*[2347] Commenters have not raised objections to the Commission's tentative conclusion on this issue.

997. Regarding the issue of interconnecting "directly or indirectly" with the facilities of other telecommunications carriers, we conclude that telecommunications carriers should be permitted to provide interconnection pursuant to section 251(a) either directly or indirectly, based upon their most efficient technical and economic choices. The interconnection obligations under section 251(a) differ from the obligations under section 251(c). Unlike section 251(c), which applies to incumbent LECs, section 251(a) interconnection applies to all telecommunications carriers including those with no market power. Given the lack of market power by telecommunication carriers required to provide interconnection via section 251(a), and the clear language of the statute, we find that indirect connection (*e.g.*, two non-incumbent LECs interconnecting with an incumbent LEC's network) satisfies a telecommunications carrier's duty to interconnect pursuant to section 251(a). We decline to adopt, at this time, Metricom's suggestion to forbear under section 10 of the 1996 Act[2348] from imposing any interconnection requirements upon non-dominant carriers. We believe that, even for telecommunications carriers with no market power, the duty to interconnect directly or indirectly is central to the 1996 Act and achieves important policy objectives. Nothing in the record convinces us that we should forbear from imposing the provisions of section 251(a) on non-dominant carriers. In fact, section 251 distinguishes between dominant and non-dominant carriers, and imposes a number of additional obligations exclusively on incumbent LECs.[2349] Similarly, we also do not agree with the Texas Commission's argument that the obligations of section 251(a) should apply equally to all telecommunications carriers. Section 251 is clear in imposing different obligations on carriers depending upon their classification (*i.e.*, incumbent LEC, LEC, or telecommunications carrier).[2350] For example, section 251(c) specifically imposes obligations upon incumbent LECs to interconnect, upon request, at all technically feasible points. This direct interconnection, however, is not required under section 251(a) of all telecommunications carriers.

[2347] *CMRS Second Report and Order*, 9 FCC Rcd at 1457-58 (1994).

[2348] 47 U.S.C. § 160.

[2349] *See* 47 U.S.C. § 251. The 1996 Act makes further provisions for rural carriers and, upon an appropriate showing, carriers serving fewer than 2 percent of the nation's access lines. *See* 47 U.S.C. § 251(f)(1), (f)(2).

[2350] 47 U.S.C. § 251.

998. Section 251(a)(2) prohibits telecommunications carriers from installing network features, functions, and capabilities that do not comply with standards or guidelines established under sections 255 and 256. Because the Commission and the Architectural and Transportation Barriers Compliance Board have not developed standards or guidelines under section 255, we find that it would be premature at this point to attempt to delineate specific requirements or definitions of terms to implement Section 251(a)(2).[2351] Similarly, the Commission has asked its federal advisory committee, the Network Reliability and Interoperability Council, for recommendations on how the Commission should implement Section 256. We intend to issue a further notice of proposed rulemaking seeking comment on what accessibility and compatibility requirements apply to telecommunications carriers who install network features, functions and capabilities.

[2351] The Illinois Commission lists several features which could provide access to individuals with disabilities, such as access to interrupt messages, directory assistance and operator services by users of text telephones (TTYs). Illinois Commission comments at 82-83. Specific accessibility requirements such as those proposed by the Illinois Commission will need to be developed in proceedings to implement section 255, and therefore, we will not set forth any required "features, functions, or capabilities" in this proceeding.

X. COMMERCIAL MOBILE RADIO SERVICE INTERCONNECTION

999. In the NPRM, we sought comment on whether interconnection arrangements between incumbent LECs and CMRS providers fall within the scope of sections 251 and 252. Application of sections 251 and 252 to LEC-CMRS interconnection arrangements involves two distinct issues. One is whether the terms and conditions of the physical interconnection between incumbent LECs and CMRS providers are governed under section 251(c)(2), and the corresponding pricing standards set forth in section 252(d)(1). The second, and perhaps more critical issue from the CMRS providers' perspective, is whether CMRS providers are entitled to reciprocal compensation for transport and termination under section 251(b)(5), and the corresponding pricing standards set forth in section 252(d)(2).[2352]

1000. We tentatively concluded in the NPRM that CMRS providers are not obliged to provide to requesting telecommunications carriers either reciprocal compensation for transport and termination of telecommunications under section 251(b)(5), or interconnection under the provisions of section 251(c)(2), but that CMRS providers may be entitled to request interconnection under section 251(c)(2) for the purposes of providing "telephone exchange service and exchange access."[2353] We sought comment on this tentative conclusion. We also asked for comment on the separate but related question of whether LEC-CMRS transport and termination arrangements fall within the scope of section 251(b)(5). In addition, we sought comment on the relationship between section 251 and section 332(c).[2354] We acknowledged that issues relating to LEC-CMRS interconnection pursuant to section 332(c) were part of an ongoing proceeding initiated before the passage of the 1996 Act[2355] and retained the prerogative of incorporating by reference the comments filed in that docket to the extent necessary. We hereby do so.

[2352] 47 U.S.C. §§ 251, 252.

[2353] 47 U.S.C. §§ 251(b)(5), 251(c)(2).

[2354] 47 U.S.C. §332(c). This section sets forth the regulatory treatment for mobile services, including the common carrier treatment of CMRS providers (except for such provisions of Title II as the Commission may specify), the right of CMRS providers to request (and the Commission to order) physical interconnection with other common carriers and the preemption of state regulation of the entry of or the rates charged by any CMRS providers.

[2355] *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Notice of Proposed Rulemaking, CC Docket No. 95-185, 11 FCC Rcd 5020 (1996) (*LEC-CMRS Interconnection NPRM*).

A. CMRS Providers and Obligations of Local Exchange Carriers Under Section 251(b) and Incumbent Local Exchange Carriers Under Section 251(c).

1. Background

1001. Section 251(b) imposes duties only on LECs, and section 251(c) imposes duties only on incumbent LECs. Section 3(26) of the Act defines "local exchange carrier" to mean "any person that is engaged in the provision of telephone exchange service or exchange access," but "does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term."[2356] In the NPRM, we sought comment on whether, and to what extent, CMRS providers should be classified as "local exchange carriers" and therefore subject to the duties and obligations imposed by section 251(b).

2. Comments

1002. Most of the comments on this issue urge that CMRS providers should not be classified as LECs.[2357] Some commenters assert that CMRS was expressly excluded from the definition of a LEC in section 3(a)(2)(44) of the 1996 Act and that the legislative history confirms that Congress intended that the Commission reconsider whether CMRS providers should be classified as LECs only if "future circumstances warrant."[2358] PCIA maintains that there is no basis for classifying CMRS providers as LECs, because CMRS is not yet a substitute for wireline local exchange service for a substantial number of subscribers, and because CMRS licensees lack the control over essential facilities that underlies the adoption of Section 251.[2359] Pronet contends that paging operators do not provide local exchange services, and that Congress did not contemplate treating CMRS providers as LECs.[2360] Some CMRS providers propose that the Commission apply the criteria in section 332(c)(3) in considering whether a CMRS provider should be classified as a LEC -- that the service is a replacement for a substantial portion

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[2356] 47 U.S.C. § 153(26).

[2357] 360 Communications comments at 9; Airtouch comments at 9; Bell Atlantic/NYNEX Mobile comments at 5; F. Williamson comments at 8-9; Cox comments at 50-51; PCIA comments at 16.

[2358] *See, e.g.*, Airtouch reply at 4-6 (*citing* H.R. Rep. No. 104-458, 104th Cong., 2d Sess. 115 (1996)); PCIA reply at 6; Bell Atlantic/NYNEX Mobile comments at 4-5; PCIA comments at 16; GTE reply at 40 (Commission already found that CMRS providers should not be regulated as LECs for the purpose of interconnection and the 1996 Act does nothing to alter this conclusion).

[2359] PCIA comments at 17; *accord* Nextel comments at 6.

[2360] Pronet comments at 8.

of the wireline telephone exchange service within a state.[2361] Nextel argues that a CMRS provider should not be classified as a LEC until it has become a substitute for a land-line telephone exchange service for a substantial portion of the communications within a state.[2362] Omnipoint states that application of the section 332(c)(3) test will permit CMRS providers, which are also small businesses, to be relieved of LEC-type regulatory burdens during their initial entry years, so that they can act as "spirited, if smaller" competitors to the incumbent LEC.[2363] The Ohio Commission contends that the Commission should consider market share, diversity of network, and name recognition in classifying CMRS providers as LECs.[2364]

1003. COMAV and National Wireless Resellers Association, on the other hand, contend that CMRS entities can provide exchange and exchange access services "and thus are *de facto*" LECs.[2365] COMAV also argues that, if a CMRS provider is a subsidiary of an incumbent LEC, it should be treated as an incumbent LEC, and thus be required to unbundle and allow direct interconnection.[2366] NARUC argues that the type of service provided, rather than the technology employed, should determine the appropriate regulatory treatment, and that a CMRS provider should therefore be treated as a LEC if it provides fixed local service.[2367] The Illinois Commission similarly indicates that a CMRS provider should be regulated as a LEC when it establishes a wireless local loop for the express purpose of competing against or bypassing the landline loop.[2368]

3. Discussion

1004. We are not persuaded by those arguing that CMRS providers should be treated as LECs, and decline at this time to treat CMRS providers as LECs. Section 3(26) of the Act, quoted above, makes clear that CMRS providers should not be classified as LECs until the Commission makes a finding that such treatment is warranted. We disagree with COMAV and National Wireless Resellers Association that CMRS providers are *de facto* LECs (and even incumbent LECs if they are affiliated with a LEC) simply

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[2361] Cox comments at 51 n.96; Omnipoint comments at 2; Vanguard comments at 21; BellSouth comments at 70; 360 Communications comments at 9; Bell Atlantic/NYNEX Mobile comments at 5.

[2362] Nextel reply at 2.

[2363] Omnipoint comments at 3-4.

[2364] Ohio Commission comments at 68.

[2365] COMAV comments at 2; National Wireless Resellers Assn comments at 7-10.

[2366] COMAV commentsat 2, 40-43.

[2367] NARUC comments at 21.

[2368] Illinois Commission comments at 63-64.

because they provide telephone exchange and exchange access services. Congress recognized that some CMRS providers offer telephone exchange and exchange access services, and concluded that their provision of such services, by itself, did not require CMRS providers to be classified as LECs. We further note that, because the determination as to whether CMRS providers should be defined as LECs is within the Commission's sole discretion, states are preempted from requiring CMRS providers to classify themselves as "local exchange carriers" or be subject to rate and entry regulation as a precondition to participation in interconnection negotiations and arbitrations under sections 251 and 252.

1005. NARUC argues that CMRS providers should be classified as LECs if they provide fixed service.[2369] We are currently seeking comment in our *CMRS Flexibility Proceeding*[2370] on the regulatory treatment to be afforded CMRS providers when they provide fixed services. Thus, we believe that it would be premature to answer that question here, based only on the record in this proceeding. We also decline to adopt the Illinois Commission's suggestion that we find that a CMRS provider is a LEC if the CMRS provider seeks to compete directly with a wireline LEC. Even if we were to accept the Illinois Commission's underlying assumption, the record in this proceeding contains no evidence that wireless local loops have begun to replace wireline loops for the provision of local exchange service. Thus, until such time that we decide otherwise, CMRS providers will not be classified as LECs, and are not subject to the obligations of section 251(b). We further note that, even if we were to classify some CMRS providers as LECs, other types of CMRS providers, such as paging providers, might not be so classified because they do not offer local exchange service or exchange access.

1006. We further note that, because CMRS providers do not fall within the definition of a LEC under section 251(h)(1), they are not subject to the duties and obligations imposed on incumbent LECs under section 251(c).[2371] An incumbent LEC is defined in section 251(h)(1), and includes only those LECs that were, on the date of enactment of the 1996 Act, deemed to be members of NECA pursuant to 47 C.F.R. § 69.601(b), or the successor or assign of a NECA member. Similarly, we do not find that CMRS providers satisfy the criteria set forth in section 251(h)(2), which grants the Commission the discretion to, by rule, provide for the treatment of a LEC as an incumbent LEC if certain conditions are met.[2372]

B. Reciprocal Compensation Arrangements Under Section 251(b)(5)

[2369] NARUC comments at 21.

[2370] *Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, WT Docket No. 96-6, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-283 (released August 1, 1996).

[2371] 47 U.S.C. § 251(h)(1). *See infra,* Section XI.C.

[2372] 47 U.S.C. § 251(h)(2). *See infra,* Section XI.C.

1007. Some parties contend that LEC-CMRS transport and termination arrangements do not fall within the scope of 251(b)(5), which requires LECs to establish reciprocal compensation arrangements for transport and termination.[2373] Other commenters argue that because CMRS providers fall within the definition of "telecommunications carriers," they fall within the scope of section 251(b)(5).[2374]

1008. Under section 251(b)(5), LECs have a duty to establish reciprocal compensation arrangements for the transport and termination of "telecommunications."[2375] Under section 3(43), "[t]he term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[2376] All CMRS providers offer telecommunications. Accordingly, LECs are obligated, pursuant to section 251(b)(5) (and the corresponding pricing standards of section 252(d)(2)), to enter into reciprocal compensation arrangements with all CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks, pursuant to the rules governing reciprocal compensation set forth in Section XI.B., below.

C. Interconnection Under Section 251(c)(2)

1. Background

1009. Section 251(c)(2)(A) provides that an incumbent LEC must provide interconnection with its local exchange network to "any requesting telecommunications carrier . . . for the transmission and routing of telephone exchange service and exchange access."[2377] In the NPRM, we tentatively concluded that CMRS providers may be entitled to request interconnection under section 251(c)(2) for the purposes of providing telephone exchange service and exchange access.[2378] We sought comment on this tentative conclusion.

2. Comments

[2373] PCIA comments at 13; PageNet comments at 10; APC comments at 1.

[2374] BellSouth comments at 63; National Wireless Resellers Assn comments at 7; Mobilemedia comments at 13.

[2375] 47 U.S.C. § 251(b)(5).

[2376] 47 U.S.C. § 153(43).

[2377] 47 U.S.C. § 251(c)(2)(A).

[2378] 47 U.S.C. § 251(c)(2).

1010. Several commenters argue that many CMRS providers provide telephone exchange service and exchange access as defined by the 1996 Act, and thus section 251(c)(2) should govern their interconnection arrangements with incumbent LECs.[2379] NYNEX contends that all CMRS providers, other than providers of one-way paging, provide telephone exchange service.[2380] The Ohio Commission contends that all voice grade CMRS providers which provide local exchange service may request interconnection under section 251(c)(2).[2381] The Pennsylvania Commission argues that all voice-grade and non-voice grade CMRS providers fit within the definition of telecommunications carriers and fall within the parameters of section 251(c)(2).[2382]

1011. Many wireless carriers argue that interconnection arrangements between incumbent LECs and CMRS providers do not fall within the scope of section 251(c)(2).[2383] CTIA claims that CMRS was intended to be regulated differently than other services because it entails different traffic flows and different termination costs.[2384] Airtouch claims that, if LEC-CMRS interconnection were found to fall within the scope of section 251, the concept of "local exchange areas" could create implementation problems and adverse policy results, thus supporting application of section 332(c)(1)(B).[2385]

3. Discussion

1012. As discussed in the preceding section, CMRS providers meet the statutory definition of "telecommunications carriers."[2386] We also agree with several commenters that many CMRS providers

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[2379] *See, e.g.*, Pennsylvania Commission comments at 34; PacTel comments at 83; Bell Atlantic/NYNEX Mobile comments at 7; Nextel comments at 6-7; API comments at 3; Florida Commission comments at 35-36.

[2380] NYNEX comments at 23.

[2381] Ohio Commission comments at 59.

[2382] Pennsylvania Commission comments at 34.

[2383] *See, e.g.*, AT&T comments at 43; Sprint comments at 70; Bell Atlantic/NYNEX Mobile comments at 2; CTIA comments at 2-3; Nextel comments at 5-6; Omnipoint comments at 3-5; Vanguard comments at 20-22; MECA comments at 59; Arch comments at 12-13; Airtouch reply at 3; Sprint/APC comments at 2-3 (Congress crafted a definition of "local exchange carrier" that excluded CMRS indicating that it did not want CMRS providers treated with all providers of telecommunications services). Sprint/APC claim in their joint comments that it is clear from the 1996 Act as a whole, and from section 332(c), that CMRS providers are entitled to reasonable interconnection from LECs without regard to section 251. Sprint/APC comments at 5.

[2384] CTIA comments at 7; Sprint/APC comments at 3.

[2385] Airtouch reply at 7.

[2386] *See supra*, Section IX.

(specifically cellular, broadband PCS and covered SMR) also provide telephone exchange service and exchange access as defined by the 1996 Act. Incumbent LECs must accordingly make interconnection available to these CMRS providers in conformity with the terms of sections 251(c) and 252, including offering rates, terms, and conditions that are just, reasonable and nondiscriminatory.[2387]

1013. The 1996 Act defines "telephone exchange service" as "service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area . . . and which is covered by the exchange service charge, *or (B) comparable service* provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service."[2388] At a minimum, we find that cellular, broadband PCS, and covered SMR providers fall within the second part of the definition because they provide "comparable service" to telephone exchange service. The services offered by cellular, broadband PCS, and covered SMR providers are comparable because, as a general matter, and as some commenters note, these CMRS carriers provide local, two-way switched voice service as a principal part of their business.[2389] Indeed, the Commission has described cellular service as exchange telephone service[2390] and cellular carriers as "generally engaged in the provision of local exchange telecommunications in conjunction with local telephone companies . . . ."[2391] In addition, although CMRS providers are not currently classified as LECs, the fact that most CMRS providers are capable, both technically and pursuant to the terms of their licenses, of providing fixed services, as LECs do, buttresses our conclusion that these CMRS providers offer services that are "comparable" to telephone exchange service and supports the notion that these services may become a true economic substitute for wireline local exchange service in the future.[2392]

[2387] 47 U.S.C. § 251(c)(2)(D).

[2388] 47 U.S.C. § 153(47) (emphasis added). This is a broader definition of "telephone exchange service" than had previously existed; Congress changed the definition in the 1996 Act to include services "comparable" to telephone exchange.

[2389] *See, e.g.*, NYNEX comments at 23.

[2390] *See Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carriers*, Memorandum Opinion and Order, 59 Rad. Reg.2d 1275, 1278 (1986).

[2391] *In the Matter of the Need to Promote Competition and Efficient Use of Spectrum For Radio Common Carrier Services*, Memorandum Opinion and Order, 59 Rad. Reg. 2d 1275, 1278 (1986) (*Competition Opinion*); *see also id*. at 1284 (cellular carriers are primarily engaged in the provision of local, intrastate exchange telephone service); *Equal Access and Interconnection Obligations Pertaining to Commercial Radio Services*, CC Docket No. 94-54, Notice of Proposed Rulemaking and Notice of Inquiry, 9 FCC Rcd 5408, 5453 and nn.192, 195 (and cases cited therein) (1994).

[2392] *See Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, WT Docket No. 96-6, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-283 (released August 1, 1996)(amending rules to allow providers of narrowband and broadband PCS, cellular, CMRS SMR, CMRS paging, CMRS 220 MHz service, and for-profit interconnected business radio services to offer fixed wireless services on

1014. We also believe that other definitions in the Act support the conclusion that cellular, broadband PCS, and covered SMR licensees provide telephone exchange service. The fact that the 1996 Act's definition of a LEC excludes CMRS until the Commission finds that such service should be included in the definition,"[2393] suggests that Congress found that some CMRS providers were providing telephone exchange service or exchange access, but sought to afford the Commission the discretion to decide whether CMRS providers should be treated as LECs under the new Act. Similarly, section 253(f) permits the states to impose certain obligations on "telecommunications carrier[s] that seek[ ] to provide telephone exchange service" in rural areas.[2394] The provision further provides that "[t]his subsection shall not apply . . . to a provider of commercial mobile services."[2395] It would have been unnecessary for the statute to include this exception if some CMRS were not telephone exchange service. Similarly, section 271(c)(1)(A), which sets forth conditions for determining the presence of a facilities-based competitor for purposes of BOC applications to provide in-region, interLATA services, provides that Part 22 [cellular] services "shall not be considered to be telephone exchange services," for purposes of that section.[2396] Again, if Congress did not believe that cellular providers were engaged in the provision of telephone exchange service, it would not have been necessary to exclude cellular providers from this provision.

1015. The arguments that CMRS traffic flows may differ from wireline traffic, that CMRS providers' termination costs may differ from LECs, that CMRS service areas do not coincide with wireline local exchange areas, or that CMRS providers are not LECs, do not alter our conclusion that cellular, broadband PCS, and covered SMR licensees provide telephone exchange service. These considerations are not relevant to the statutory definition of telephone exchange service in section 3(47). Incumbent LECs are required to provide interconnection to CMRS providers who request it for the transmission and routing of telephone exchange service or exchange access, under the plain language of section 251(c)(2).[2397]

D. Jurisdictional Authority for Regulation of LEC-CMRS Interconnection Rates

1. Background

their assigned spectrum on a co-primary basis with mobile services).

[2393] 47 U.S.C. § 153(26).

[2394] 47 U.S.C. § 253(f).

[2395] *Id*.

[2396] 47 U.S.C. § 271(c)(1)(A).

[2397] 47 U.S.C. § 251(c)(2).

1016. In the NPRM, we sought comment on the relationship between section 251 and section 332(c).[2398] As noted above, we hereby incorporate by reference the comments filed in CC Docket No. 95-185 to the extent relevant to our analysis. In the NPRM, we noted that we had previously sought comment on the relationship of these two statutory provisions in the LEC-CMRS Interconnection proceeding.[2399] In the LEC-CMRS proceeding, we tentatively concluded that the Commission has sufficient authority to promulgate specific federal requirements for interstate and intrastate LEC-CMRS interconnection arrangements, including the adoption of a specific interim bill and keep arrangement.[2400] However, we reached that tentative conclusion before the enactment of the 1996 Act.

2. Comments

1017. Several wireless firms argue that LEC-CMRS interconnection rates are governed by section 332 rather than (or in addition to) sections 251 and 252.[2401] One argument advanced by some parties is that section 251(i), which provides that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201,"[2402] preserves the Commission's authority over interstate interconnection under section 201.[2403] Thus, they argue, section 251(i) enables the Commission to not apply sections 251 and 252 whenever interstate services are at issue.[2404] Cox states that, because "Section 251 does not prevent the Commission from establishing an interconnection policy for LEC-to-CMRS traffic under its general Section 201 powers, Section 252 has no particular relevance for any interconnection policy established by this proceeding."[2405]

1018. Another theory proposed by several wireless carriers is that section 332 makes all CMRS interconnection issues interstate, including interconnection rates, and thus all CMRS interconnection matters

[2398] 47 U.S.C. § 332.

[2399] NPRM at para. 169.

[2400] *Id*. at 5072-73.

[2401] *See, e.g*., AT&T comments at 42; Airtouch comments at 5; Cox comments at 50; CTIA reply at 2; PCIA comments at 3-9.

[2402] 47 U.S.C. § 251(i).

[2403] *See, e.g*., Cox comments in CC Docket No. 95-185 at 43-44; CTIA comments in CC Docket No. 95-185 at 62; Omnipoint comments at 12; Vanguard Cellular comments at 15.

[2404] Cox comments in CC Docket No. 95-185 at 43-44.

[2405] *Id*. at 44.

are subject to federal jurisdiction under section 201, and are not governed by sections 251 and 252.[2406] These parties assert that, prior to the 1993 Budget Act, the Commission did not exercise any authority over the intrastate rates of LEC interconnection provided to radio common carriers, but that the 1993 Budget Act changed the Commission's jurisdiction over LEC-CMRS interconnection rates.[2407] Parties rely on two provisions amended or added by the 1993 Budget Act to reach this conclusion. First, they point to section 332(c)(3), entitled "State Preemption," which provides in pertinent part that "*[n]otwithstanding section[ ] 2(b) . . .* , no State or local government shall have any authority to regulate the entry of or *the rates charged by any commercial mobile service* or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services."[2408] Second, commenters point to a limiting clause added to section 2(b), which provides that: "*[e]xcept as provided in section 223 through 227, inclusive, and section 332 . . .* , nothing in this Act shall be construed to apply or to give the Commission jurisdiction [over intrastate telecommunications]."[2409] Cox interprets these cross-references to mean that, "[u]nder this revised framework, the States retain jurisdiction to regulate the 'terms and conditions' of CMRS service delivered to end users and can petition the Commission to regulate CMRS rates when CMRS becomes a substitute for landline telephone service," but that "[i]n the meantime, CMRS is a wholly interstate service and any interconnection to a CMRS provider, regardless of the source, is an interconnection governed by the FCC's interstate jurisdiction under Section 201 of the Communications Act."[2410]

1019. Some parties further argue that section 332(c)(1)(B) gives the Commission exclusive jurisdiction over LEC-to-CMRS interconnection rates.[2411] Cox argues that section 332(c)(1)(B) expands the Commission's jurisdiction over CMRS by authorizing the Commission to order any common carrier, regardless of whether it is an intrastate or interstate carrier, to establish physical connections with any CMRS provider. Section 332(c)(1)(B) thus shows, according to Cox, "Congress' intent that the Commission be given full jurisdiction to regulate *all* aspects of CMRS, including interconnection to and

[2406] *Id.* at 39 n.77. *See also, e.g.*, Comcast comments in CC Docket No. 95-185 at 27; PageNet comments in CC Docket No. 95-185 at 37-38.

[2407] *Id.*

[2408] 47 U.S.C. § 332(c)(3)(A) (emphasis added).

[2409] 47 U.S.C. § 152(b) (emphasis added).

[2410] Cox comments in CC Docket No. 95-185 at 38-39.

[2411] *See, e.g.*, CTIA comments in Docket 95-185 at 62; Cox comments in CC Docket No. 95-185 at 44 n.78; Comcast comments in CC Docket No. 95-185 at 32.

from CMRS providers."[2412] Airtouch states that the Commission's section 201 jurisdiction is unaffected by Section 332(c)(1)(B) "except to the extent that the Commission is required to respond to [any CMRS provider's interconnection] request," and thus, section 332(c)(1)(B) does expand the Commission's section 201 authority, but only to the extent that LEC-CMRS interconnection - interstate and/or intrastate - is involved.[2413] CTIA contends that section 332(c)(3) must be read in a way that does not result in a one-sided regulatory scheme for LEC-to-CMRS interconnection and CMRS-to-LEC interconnection.[2414] Thus, according to CTIA, since section 332(c)(3) clearly preempts state regulation of interconnection rates charged *by* CMRS providers, it also preempts state regulation of interconnection rates charged *to* CMRS providers by LECs.[2415]

1020. Some parties contend that, because CMRS providers need interconnection to enter the market, all state regulation of interconnection affecting CMRS (including the intrastate rates charged by LECs) is entry regulation and therefore preempted under section 332(c)(3).[2416] Other commenters argue that section 253(e), which provides that "[n]othing in this section shall affect the application of section 332(c)(3) to commercial mobile service providers," demonstrates the Commission's exclusive jurisdiction over CMRS interconnection rates.[2417] CTIA argues that, "to apply Sections 251 and 252 to the LEC-CMRS relationship in place of Section 332, the Commission would effectively strip Section 332 of any meaning."[2418] Several parties also cite to the legislative history of both the 1993 Budget Act and the 1996 Act as support for their claims that section 332 governs LEC-CMRS interconnection arrangements.[2419] Some commenters note that the 1996 Act did not explicitly repeal section 332, and state that implicit

[2412] Cox comments in CC Docket No. 95-185 at 39 n.78 (emphasis in original).

[2413] Airtouch comments at 6; *Ex Parte* letter from Kathleen Q. Abernathy, Airtouch, to William F. Caton, Acting Secretary, FCC, July 18, 1996, at 1-2.

[2414] CTIA comments in CC Docket No. 95-185 at 73.

[2415] *Id.*

[2416] Omnipoint comments in CC Docket No. 95-185 at 13 (disparate state regulation of interconnection would serve as a prohibited state barrier to entry under section 332(c)(3)); Celpage comments in CC Docket No. 95-185 at 11-12 (inconsistent state regulation of LEC-CMRS interconnection rates would create barriers to entry).

[2417] *See, e.g.*, PageNet comments at 29; *Ex Parte* letter in CC Docket No. 95-185 from Werner K. Hartenberger and Laura H. Phillips, Counsel for Cox Enterprises, Inc., to William F. Caton, Acting Secretary, FCC, February 28, 1996, at 8 (Cox Feb. 28 *Ex Parte*); *see also* Nextel reply at 5.

[2418] CTIA comments at 59-60.

[2419] *See e.g.*, Cox comments at 43-44; *Ex Parte* letter in CC Docket No. 95-185 from Robert F. Roche, CTIA, to William F. Caton, Acting Secretary, FCC, February 28, 1996, at 1.

repeals are disfavored under principles of statutory construction.[2420] In addition, Cox argues that the exception in section 271(c) for cellular providers suggests that Congress considers cellular service to be in an entirely different competitive market from landline local exchange service, thus preserving the Commission's exclusive jurisdiction over LEC-CMRS interconnection granted by the 1993 Budget Act.[2421]

1021. Incumbent LECs and other parties, on the other hand, argue that section 251 controls interconnection between CMRS providers and incumbent LECs.[2422] Several of these parties contend that section 332 only governs the rates CMRS providers charge their end users, not the rates that LECs or CMRS providers charge other telecommunications carriers for interconnection.[2423] NYNEX claims that, while section 332(c)(1)(B) addresses the establishment of physical interconnection, it does not address particular compensation arrangements for interconnection between carriers, which Congress has now addressed in sections 251 and 252.[2424] Parties further note that the language in section 332(c)(1), stating that "this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection" expressly limits the Commission's authority to respond to a CMRS provider's request for interconnection and thus does not give the Commission jurisdiction over LEC-CMRS interconnection rates.[2425] BellSouth further argues that subjecting CMRS providers' charges for termination of LEC-originated calls to federal preemption would be inconsistent with Congress's determination in the 1996 Act that the terms and conditions of interconnection are to be decided by negotiation among LECs and telecommunications carriers, subject to the state review process.[2426]

[2420] *See, e.g.,* Cox reply in CC Docket No. 95-185 at 69-70.

[2421] Cox Feb. 28 *Ex Parte* in CC Docket No. 95-185 at 8. Section 271(c)(1)(A) provides that, as one of the preconditions for BOC entry into the in-region, interLATA services market, a BOC must demonstrate the presence of a facilities-based competitor that provides telephone exchange service to residential and business subscribers. This section further provides that, "[f]or the purpose of this subparagraph, services provided pursuant to subpart K of part 22 of the Commission's regulations [cellular], . . . shall not be considered to be telephone exchange services." 47 U.S.C. § 271(c)(1)(A).

[2422] *See, e.g.*, USTA comments at 66-67; NYNEX comments at 23; PacTel comments at 83, reply at 38; Bell Atlantic/NYNEX Mobile comments at 7; BellSouth comments at 63; Pennsylvania Commission comments at 34.

[2423] *See, e.g.,* PacTel reply at 38; U S West comments at 61; *Ex Parte* letter in CC Docket No. 95-185 from Michael K. Kellogg, Counsel for Bell Atlantic and PacTel, to William F. Caton, Acting Secretary, FCC, February 26, 1996, at 4; BellSouth comments in CC Docket No. 95-185 at 34; Pennsylvania Commission comments at 34-35.

[2424] NYNEX reply at 13.

[2425] Ameritech comments in CC Docket No. 95-185 at 11; BellSouth comments in CC Docket No. 95-185 at 34-35.

[2426] BellSouth comments in CC Docket No. 95-185 at 35.

3. Discussion

1022. Several parties in this proceeding argue that sections 251 and 252 provide the exclusive jurisdictional basis for regulation of LEC-CMRS interconnection rates.[2427] Other parties assert that sections 332 and 201 provide the exclusive jurisdictional basis for regulation of LEC-CMRS interconnection rates.[2428] Some parties have argued that jurisdiction resides concurrently under sections 251 and 252, on the one hand, and under sections 332 and 201 on the other.[2429]

1023. Sections 251, 252, 332 and 201 are designed to achieve the common goal of establishing interconnection and ensuring interconnection on terms and conditions that are just, reasonable, and fair. It is consistent with the broad authority of these provisions to hold that we may apply sections 251 and 252 to LEC-CMRS interconnection. By opting to proceed under sections 251 and 252, we are not finding that section 332 jurisdiction over interconnection has been repealed by implication, or rejecting it as an alternative basis for jurisdiction. We acknowledge that section 332 in tandem with section 201 is a basis for jurisdiction over LEC-CMRS interconnection; we simply decline to define the precise extent of that jurisdiction at this time.

1024. As a practical matter, sections 251 and 252 create a time-limited negotiation and arbitration process to ensure that interconnection agreements will be reached between incumbent LECs and telecommunications carriers, including CMRS providers. We expect that our establishment of pricing methodologies and default proxies which may be used as interim rates will help expedite the parties' negotiations and drive voluntary CMRS-LEC interconnection agreements. We also believe that sections 251 and 252 will foster regulatory parity in that these provisions establish a uniform regulatory scheme governing interconnection between incumbent LECs and all requesting carriers, including CMRS providers. Thus, we believe that sections 251 and 252 will facilitate consistent resolution of interconnection issues for CMRS providers and other carriers requesting interconnection.

1025. Although we are applying sections 251 and 252 to LEC-CMRS interconnection at this time, we preserve the option to revisit this determination in the future. We note that Section 332 generally precludes states from rate and entry regulation of CMRS providers, and thus, differentiates CMRS

[2427] *See, e.g.*, USTA comments at 66-67; NYNEX comments at 23; PacTel comments at 83, reply at 38; Bell Atlantic/NYNEX Mobile comments at 7; BellSouth comments at 63; Pennsylvania Commission comments at 34.

[2428] *See, e.g.*, Cox comments in CC Docket No. 95-185 at 43-44; CTIA comments in CC Docket No. 95-185 at 62; Omnipoint comments at 12; Vanguard comments at 15.

[2429] *See, e.g.*, AT&T comments in CC Docket No. 95-185 at 28-30; AT&T comments at 42-44; *see also* PCIA comments in CC Docket No. 95-185 at 23-26; Century Cellunet comments in CC Docket No. 95-185 at 10-14.

providers from other carriers.[2430] We also recognize that, based on the combined record in CC Docket No. 95-185 and CC Docket No. 96-68, there have been instances in which state commissions have treated CMRS providers in a discriminatory manner with respect to the terms and conditions of interconnection.[2431] Should the Commission determine that the regulatory scheme established by sections 251 and 252 does not sufficiently address the problems encountered by CMRS providers in obtaining interconnection on terms and conditions that are just, reasonable and nondiscriminatory, the Commission may revisit its determination not to invoke jurisdiction under section 332 to regulate LEC-CMRS interconnection rates.

1026. Our decision to proceed under section 251 as a basis for regulating LEC-CMRS interconnection rates should not be interpreted as undercutting our intent to enforce Section 332(c)(3), for example, where state regulation of interconnection rates might constitute regulation of CMRS entry. In such situations, state action might be precluded by either section 332 or section 253. Such circumstances would require a case-by-case evaluation. We note, however, that we are aware of numerous specific state requirements that may constitute CMRS entry or rate regulation preempted by section 332. For example, many states, such as California, require all telecommunications providers to certify that the public convenience and necessity will be served as a precondition to construction and operation of telecommunications services within the state.[2432] Some states, such as Alaska and Connecticut, also require CMRS providers to certify as service providers other than CMRS in order to obtain the same treatment afforded other telecommunications providers under state law.[2433] Hawaii and Louisiana, in addition to imposing a certification requirement, require CMRS providers and other telecommunications carriers to file tariffs with the state commission.[2434] We will not permit entry regulation through the exercise of states'

[2430] In passing section 332 in 1993, Congress stated that it intended to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure." H.R. Report No. 103-11, 103d. Cong., 1st Sess. 260 (1993).

[2431] *See supra*, Section VII.D.

[2432] CAL. PUBLIC UTILITIES CODE Sections 1001,1005 (West 1995); ALASKA STAT. Section 42.05221 (1995); CONN. GEN. STAT. Section 16-247g (1995); HAW. REV. STAT. Section 269-7.5 (1995); NEB. REV. STAT. Section 86-805 (1995); N.M. STAT. ANN. Section 63-9B-4 (Michie 1996).

[2433] *See In the Matter of Motion for a Declaratory Ruling Concerning Preemption of Alaska Call Routing and Interexchange Certification Regulation as Applies to Cellular Carriers*, File No. WTB/POL 95-2, *Motion for a Declaratory Ruling*, Alaska-3 Cellular d/b/a CellularOne, p.5, para. 11 (filed Sept. 22, 1995); *Decision, Investigation Into Wireless Mutual Compensation Plans*, State of Connecticut, Department of Public Utility control, at 15 (Connecticut Commission Sept. 22, 1995).

[2434] HAW. REV. STAT. Section 6-80-29 (1996); *see In re Regulations for Competition in the Local Telecommunications Market*, General Order, Louisiana Public Service Commission, §§ 301, 401 (Louisiana Commission March 15, 1996).

sections 251/252 authority or otherwise. In this regard, we note that states may not impose on CMRS carriers rate and entry regulation as a pre-condition to participation in interconnection agreements that may be negotiated and arbitrated pursuant to sections 251 and 252. We further note that the Commission is reviewing filings made pursuant to section 253 alleging that particular states or local governments have requirements that constitute entry barriers, in violation of section 253. We will continue to review any allegations on an ongoing basis, including any claims that states or local governments are regulating entry or imposing requirements on CMRS providers that constitute barriers to market entry.

XI. OBLIGATIONS IMPOSED ON LECS BY SECTION 251(b)[2435]

A. Reciprocal Compensation for Transport and Termination of Telecommunications

1. Statutory Language

1027. Section 251(b)(5) provides that all LECs, including incumbent LECs, have the duty to "establish reciprocal compensation arrangements for the transport and termination of telecommunications."[2436] Section 252(d)(2) states that, for the purpose of compliance by an incumbent LEC with section 251(b)(5), a state commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless such terms and conditions both: (1) provide for the "mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier," and (2) "determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls."[2437] That subsection further provides that the foregoing language shall not be construed "to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill and keep arrangements),"[2438] or to authorize the Commission or any state to "engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or require carriers to maintain records with respect to the additional costs of such calls."[2439] The legislative history indicates that "mutual and reciprocal recovery of costs . . . may include a range of compensation schemes, such as in-kind exchange of traffic without cash payment (known as bill-and-keep arrangements)."[2440]

[2435] Additional obligations imposed by section 251(b) are addressed in a separate order. *See* NPRM at paras. 202-219.

[2436] 47 U.S.C. § 251(b)(5).

[2437] 47 U.S.C. § 252(d)(2)(A).

[2438] *Id*. at § 252(d)(2)(B)(i).

[2439] *Id*. at § 252(d)(2)(B)(ii).

[2440] Joint Explanatory Statement at 7.

2. Definition of Transport and Termination of Telecommunications

a. Background

1028. In the NPRM, we sought comment on whether "transport and termination of telecommunications" under section 251(b)(5) is limited to certain types of traffic.[2441] We noted that the statutory provision appears to encompass telecommunications traffic that originates on the network of one LEC and terminates on the network of a competing provider in the same local service area as well as traffic passing between LECs and CMRS providers.[2442] We sought comment on whether section 251(b)(5) also encompasses telecommunications traffic passing between neighboring LECs that do not compete with one another.[2443] We also observed in the NPRM that section 252(d)(2) is entitled "Charges for Transport and Termination of Traffic," and it could be interpreted to permit separate charges for these two components of reciprocal compensation.[2444] We sought comment on this issue.

b. Comments

1029. Numerous commenters contend that section 251(b)(5) applies to traffic originating on the network of one LEC and terminating on the network of another LEC, including both the traffic exchanged between competing LECs and traffic exchanged between neighboring LECs that do not compete with one another.[2445] The Oregon Commission points out that neither section 251 nor any other provision of the Act excludes the transport and termination of telecommunications traffic passing between neighboring LECs that do not compete with one another.[2446] Several incumbent LECs, however, contend that the requirements imposed on LECs by section 251(b), including reciprocal compensation for transport and termination of traffic, make no sense except in the context of LECs offering service in the same geographic area, because these requirements are relevant only to the competitive relationship between such carriers.[2447] In addition, several commenters contend that parties and states will need to determine the local service area within

[2441] NPRM at para. 231.

[2442] NPRM at para. 230.

[2443] *Id.*

[2444] NPRM at para. 231.

[2445] *See, e.g.,* Ohio Commission comments at 68-69; MFS comments at 76; Time Warner comments at 85-86.

[2446] Oregon Commission comments at 35.

[2447] PacTel comments at 95-96; NYNEX comments at 85; *see also* Florida Commission comments at 38-39.

which the compensation right applies.[2448] RTC asserts that elimination of multicompany existing extended area service (EAS)[2449] would cause great rate disruption around the country.[2450]

1030. A wide range of commenters also contend that reciprocal compensation should apply to arrangements between CMRS providers and LECs.[2451] Numerous commenters in the *LEC-CMRS Interconnection* proceeding have argued that CMRS providers do not receive reciprocal compensation for the transport and termination of traffic from incumbent LECs,[2452] and in some cases incumbent LECs require CMRS providers to compensate the LEC for wireline-originated traffic terminated on their wireless systems.[2453] PageNet, however, contends that section 251 is not directly applicable to interconnection arrangements between incumbent LECs and CMRS providers.[2454] Instead, it argues that incumbent LEC to CMRS interconnection is governed by section 332 of the 1934 Act.[2455] Several wireless providers argue that neither CMRS nor traditional paging service fits the Act's definition of a local exchange service and, therefore, these services are exempt from section 251(b) requirements.[2456] Paging companies commented in the *LEC-CMRS Interconnection* proceeding that, despite the fact that paging companies must terminate incoming incumbent LEC calls, the paging companies pay the LECs for call origination,

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[2448] *See* GTE comments at 54; Continental comments at 12-13 (asserting that a new entrant should not be required to pay toll access charges to terminate its customers within its local calling area); NCTA reply at 17 (arguing that the Commission should reject incumbent LECs' arguments that reciprocal compensation arrangements between incumbent LECs and competitive LECs are only applicable to the termination of incumbent LEC-defined local traffic). *But see* PacTel reply at 48 (arguing that transport and termination does not extend to all intraLATA calls because such a requirement would read access charges out of the Act).

[2449] EAS is considered an interexchange service between non-competing LECs.

[2450] RTC reply at v; *see also* GVNW comments at 41 (Historical interconnection arrangements between neighboring incumbent LECs should not be used as a basis for determining appropriate compensation between carriers competing in the same service areas under a statutory mandate to base compensation on the cost of terminating a call).

[2451] *See, e.g.,* Ohio Commission comments at 68-69; NYNEX comments at 85; ProNet comments at 11-12.

[2452] *See, e.g.,* RCC comments in CC Docket No. 95-185 at 5; 360 Degrees comments in CC Docket No. 95-185 at 3; Western Wireless comments in CC Docket No. 95-185 at 13; Omnipoint reply in CC Docket No. 95-185 at 3-7.

[2453] *See, e.g.,* CMT Partners comments in CC Docket No. 95-185 at 4; Century Cellunet comments in CC Docket No. 95-185 at 4; Nextel Communications comments in CC Docket No. 95-185 at 5; Centennial Cellular Corp. comments in CC Docket No. 95-185 at 9.

[2454] PageNet comments at 12-14.

[2455] *Id.; see also* PCIA comments at 1-12; Mobilemedia comments at 5-12; Arch comments at 17.

[2456] *See, e.g.,* ProNet comments at 7; Arch comments at 17; BANM comments at 2.

rather than receive compensation for call termination.[2457] They also contend that paging companies should be permitted to charge reasonable call termination fees to the LECs.[2458]

1031. Incumbent LECs as well as other commenters contend that transport and termination should be treated as two distinct functions.[2459] They generally define transport as carrying traffic between switches within a network, while termination is characterized as delivering traffic through the last end-office switch to the end user.[2460] The Texas Public Utility Counsel argues that, to the extent that transport functions and call termination functions have different cost structures, the Act would mandate a two-part pricing structure.[2461] U S West notes that, while there is no natural substitute for termination, transport is interoffice and would generally be interchangeable with similar network elements or tariffed access services.[2462] In addition, Citizens Utilities contends that, depending on the location of the physical interconnection point between two carriers and each carrier's network design, the terminating carrier may or may not perform any transport service in the call delivery process.[2463] Therefore, it argues that the transport function logically should be unbundled from the termination function.[2464] USTA and potential new entrants, however, argue that transport and termination describe a single function, the costs of which should be recovered from a single charge for purposes of reciprocal compensation.[2465] GST believes that subdivision of transport and termination as a means of applying asymmetrical rate structures conflicts with the statute's command of

[2457] *See* PageNet reply in CC Docket No. 95-185 at 5.

[2458] *See, e.g.*, PageNet comments in CC Docket No. 95-185 at 25-29.

[2459] *See, e.g.*, U S West comments at 69; PacTel comments at 97; GTE comments at 18; Florida Commission comments at 39.

[2460] *See, e.g.*, U S West comments at 69; PacTel comments at 97; GTE comments at 18; BellSouth comments at 71.

[2461] Texas Public Utility Counsel comments at 49-50; *see also* Arch comments at 17-18; Florida Commission comments at 39.

[2462] U S West comments at 69. Similarly, CFA/CU argues that the availability of termination for new entrants is a monopoly enjoyed by the incumbent LEC as a legacy of its historic monopoly. CFA/CU comments at 52-53; *see also* MFS reply at 17.

[2463] Citizens Utilities comments at 29; *see also* BellSouth comments at 71.

[2464] *Id.*

[2465] USTA comments at 80; *see also* GST comments at 35-38; MFS comments at 76-77; Time Warner comments at 86-88; TCI comments at 27-28.

reciprocal compensation, and gives LECs incentives to tilt the balance of payment through their network design decisions.[2466]

1032. In addition, Sprint contends that section 251(b)(5) arguably applies to transport and termination of toll traffic as well as local traffic.[2467] Sprint contends, however, that in the context of section 252(d)(2), which establishes a pricing rule for reciprocal compensation where one of the carriers is an incumbent LEC, it appears that Congress intended to confine to local traffic the obligation of transport and termination.[2468] Several other commenters also maintain that toll traffic should remain subject to access charges and not section 251(b)(5) obligations, at least until access charge reform can be implemented.[2469] RTC argues that Congress made it clear that it did not intend the Act to change the access charge regime.[2470] Frontier, however, contends that Sprint's reliance on the wording of section 252(d)(2) as limiting the scope of section 251(b)(5) is simply misguided.[2471] Frontier argues that, at best, section 252(d)(2)'s silence regarding the pricing by an incumbent LEC simply meant that Congress did not intend to constrain the Commission decisions in the pricing of transport and termination by a non-incumbent LEC under section 252(d)(2).[2472] In sum, Frontier contends that the general principles of mutual and reciprocal compensation under section 251(b)(5) would apply to all traffic, while section 252(d)(2) applies to incumbent LEC pricing of mutual compensation involving any additional costs of transport and termination.[2473]

[2466] GST comments at 35-38.

[2467] Sprint comments at 76.

[2468] *Id.* at 76-77.

[2469] *See, e.g.,* Alabama Commission comments at 32-33; PacTel comments at 95-96, 98, reply at 48; MFS comments at 76.

[2470] RTC reply at 9.

[2471] Frontier reply at 19.

[2472] *Id.*

[2473] *Id.*

c. Discussion

(1) Distinction between "Transport and Termination" and Access

1033. We recognize that transport and termination of traffic, whether it originates locally or from a distant exchange, involves the same network functions. Ultimately, we believe that the rates that local carriers impose for the transport and termination of local traffic and for the transport and termination of long distance traffic should converge. We conclude, however, as a legal matter, that transport and termination of local traffic are different services than access service for long distance telecommunications. Transport and termination of local traffic for purposes of reciprocal compensation are governed by sections 251(b)(5) and 252(d)(2), while access charges for interstate long-distance traffic are governed by sections 201 and 202 of the Act. The Act preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long-distance traffic.

1034. We conclude that section 251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area, as defined in the following paragraph. We disagree with Frontier's contention that section 251(b)(5) entitles an IXC to receive reciprocal compensation from a LEC when a long-distance call is passed from the LEC serving the caller to the IXC. Access charges were developed to address a situation in which three carriers -- typically, the originating LEC, the IXC, and the terminating LEC -- collaborate to complete a long-distance call. As a general matter, in the access charge regime, the long-distance caller pays long-distance charges to the IXC, and the IXC must pay both LECs for originating and terminating access service.[2474] By contrast, reciprocal compensation for transport and termination of calls is intended for a situation in which two carriers collaborate to complete a local call. In this case, the local caller pays charges to the originating carrier, and the originating carrier must compensate the terminating carrier for completing the call. This reading of the statute is confirmed by section 252(d)(2)(A)(i), which establishes the pricing standards for section 251(b)(5). Section 251(d)(2)(A)(i) provides for "recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier."[2475] We note that our conclusion that long distance traffic is not subject to the transport and termination provisions of section 251 does not in any way disrupt the ability of IXCs to terminate their interstate long-distance traffic on LEC networks. Pursuant to section 251(g), LECs must continue to offer tariffed interstate access services just as they did prior to enactment of the 1996 Act. We find that the reciprocal compensation provisions of section 251(b)(5) for transport and termination of traffic do not apply to the transport or termination of interstate or intrastate interexchange traffic.

[2474] In addition, both the caller and the party receiving the call pay a flat-rated interstate access charge -- the end-user common line charge -- to the respective incumbent LEC to whose network each of these parties is connected.

[2475] 47 U.S.C. § 252(d)(2)(A)(i).

1035. With the exception of traffic to or from a CMRS network, state commissions have the authority to determine what geographic areas should be considered "local areas" for the purpose of applying reciprocal compensation obligations under section 251(b)(5), consistent with the state commissions' historical practice of defining local service areas for wireline LECs. Traffic originating or terminating outside of the applicable local area would be subject to interstate and intrastate access charges. We expect the states to determine whether intrastate transport and termination of traffic between competing LECs, where a portion of their local service areas are not the same, should be governed by section 251(b)(5)'s reciprocal compensation obligations or whether intrastate access charges should apply to the portions of their local service areas that are different. This approach is consistent with a recently negotiated interconnection agreement between Ameritech and ICG that restricted reciprocal compensation arrangements to the local traffic area as defined by the state commission.[2476] Continental Cablevision, in an *ex parte* letter, states that many incumbent LECs offer optional expanded local area calling plans, in which customers may pay an additional flat rate charge for calls within a wider area than that deemed as local, but that terminating intrastate access charges typically apply to calls that originate from competing carriers in the same wider area.[2477] Continental Cablevision argues that local transport and termination rates should apply to these calls. We lack sufficient record information to address the issue of expanded local area calling plans; we expect that this issue will be considered, in the first instance, by state commissions. In addition, we expect the states to decide whether section 251(b)(5) reciprocal compensation provisions apply to the exchange of traffic between incumbent LECs that serve adjacent service areas.

1036. On the other hand, in light of this Commission's exclusive authority to define the authorized license areas of wireless carriers, we will define the local service area for calls to or from a CMRS network for the purposes of applying reciprocal compensation obligations under section 251(b)(5).[2478] Different types of wireless carriers have different FCC-authorized licensed territories, the largest of which is the "Major Trading Area" (MTA).[2479] Because wireless licensed territories are federally authorized, and vary in size, we conclude that the largest FCC-authorized wireless license territory (*i.e.*, MTA) serves as the most appropriate definition for local service area for CMRS traffic for purposes of reciprocal compensation under section 251(b)(5) as it avoids creating artificial distinctions between CMRS providers. Accordingly,

[2476] *See* letter from Albert H. Kramer, Dickstein, Shapiro, Morin & Oshinsky LLP to John Nakahata, Senior Legal Advisor to the Chairman, FCC, July 11, 1996.

[2477] Letter from Brenda L. Fox, Vice President, Federal Relations, Continental Cablevision, to Robert Pepper, Chief, Office of Plans and Policy, FCC, July 22, 1996, attached to Letter from Donna N. Lampert, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., to William F. Caton, Acting Secretary, FCC, July 22, 1996.

[2478] *See also infra*, Section XI.A.c.3.

[2479] *See* Rand McNally, Inc., *1992 Commercial Atlas & Marketing Guide* 38-39 (1992).

traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges.

1037. We conclude that section 251(b)(5) obligations apply to all LECs in the same state-defined local exchange service areas, including neighboring incumbent LECs that fit within this description. Contrary to the arguments of NYNEX and Pacific Telesis, neither the plain language of the Act nor its legislative history limits this subsection to the transport and termination of telecommunications traffic between new entrants and incumbent LECs. In addition, applying section 251(b)(5) obligations to neighboring incumbent LECs in the same local exchange area is consistent with our decision that all interconnection agreements, including agreements between neighboring LECs, must be submitted to state commissions for approval pursuant to section 252(e).[2480]

1038. Under section 252, neighboring states may establish different rate levels for transport and termination of traffic.[2481] In cases in which territory in multiple states is included in a single local service area, and a local call from one carrier to another crosses state lines, we conclude that the applicable rate for any particular call should be that established by the state in which the call terminates. This provides an administratively convenient rule, and termination of the call typically occurs in the same state where the terminating carrier's end office switch is located and where the cost of terminating the call is incurred.

(2) Distinction between "Transport" and "Termination"

1039. We conclude that transport and termination should be treated as two distinct functions. We define "transport," for purposes of section 251(b)(5), as the transmission of terminating traffic that is subject to section 251(b)(5) from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party (or equivalent facility provided by a non-incumbent carrier). Many alternative arrangements exist for the provision of transport between the two networks. These arrangements include: dedicated circuits provided either by the incumbent LEC, the other local service provider, separately by each, or jointly by both; facilities provided by alternative carriers; unbundled network elements provided by incumbent LECs; or similar network functions currently offered by incumbent LECs on a tariffed basis. Charges for transport subject to section 251(b)(5) should reflect the forward-looking cost of the particular provisioning method.

1040. We define "termination," for purposes of section 251(b)(5), as the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery

[2480] *See supra,* Section III.D.

[2481] We discuss the methodology states should follow in establishing transport and termination rates *infra,* Section IX.A.3.c.(3).

of that traffic from that switch to the called party's premises. In contrast to transport, for which some alternatives exist, alternatives for termination are not likely to exist in the near term. A carrier or provider typically has no other mechanism for delivering traffic to a called party served by another carrier except by having that called party's carrier terminate the call. In addition, forward-looking costs are calculated differently for the transport of traffic and the termination of traffic, as discussed above in the unbundled elements section.[2482] As such, we conclude that we need to treat transport and termination as separate functions -- each with its own cost. With respect to GST's contention that separate charges for transport and termination of traffic will allow incumbent LECs to "game" the system through network design decisions, we conclude in the interconnection section above that interconnecting carriers may interconnect at any technically feasible point.[2483] We find that this sufficiently limits LECs' ability to disadvantage interconnecting parties through their network design decisions.

(3) CMRS-Related Issues

1041. Section 251(b)(5) obligates LECs to establish reciprocal compensation arrangements for the transport and termination of telecommunications traffic. Although section 252(b)(5) does not explicitly state to whom the LEC's obligation runs, we find that LECs have a duty to establish reciprocal compensation arrangements with respect to local traffic originated by or terminating to any telecommunications carriers. CMRS providers are telecommunications carriers and, thus, LECs' reciprocal compensation obligations under section 251(b)(5) apply to all local traffic transmitted between LECs and CMRS providers.

1042. We conclude that, pursuant to section 251(b)(5), a LEC may not charge a CMRS provider or other carrier for terminating LEC-originated traffic. Section 251(b)(5) specifies that LECs and interconnecting carriers shall compensate one another for termination of traffic on a reciprocal basis. This section does not address charges payable to a carrier that originates traffic. We therefore conclude that section 251(b)(5) prohibits charges such as those some incumbent LECs currently impose on CMRS providers for LEC-originated traffic. As of the effective date of this order, a LEC must cease charging a CMRS provider or other carrier for terminating LEC-originated traffic and must provide that traffic to the CMRS provider or other carrier without charge.

1043. As noted above, CMRS providers' license areas are established under federal rules, and in many cases are larger than the local exchange service areas that state commissions have established for incumbent LECs' local service areas.[2484] We reiterate that traffic between an incumbent LEC and a CMRS

[2482] *See infra*, Section XI.A.3.c.(3).

[2483] *See supra*, Section VII.B.2.

[2484] *See* 47 C.F.R. §§ 22.911, 24.202; *see also* PCIA comments in CC Docket No. 95-185 at 21-22; Letter from Leonard J. Kennedy, on behalf of Comcast Cellular Communications, to William Caton, Acting Secretary, FCC, July 25, 1996.

network that originates and terminates within the same MTA (defined based on the parties' locations at the beginning of the call) is subject to transport and termination rates under section 251(b)(5), rather than interstate or intrastate access charges. Under our existing practice, most traffic between LECs and CMRS providers is not subject to interstate access charges unless it is carried by an IXC, with the exception of certain interstate interexchange service provided by CMRS carriers, such as some "roaming" traffic that transits incumbent LECs' switching facilities, which is subject to interstate access charges.[2485] Based on our authority under section 251(g) to preserve the current interstate access charge regime, we conclude that the new transport and termination rules should be applied to LECs and CMRS providers so that CMRS providers continue not to pay interstate access charges for traffic that currently is not subject to such charges, and are assessed such charges for traffic that is currently subject to interstate access charges.[2486]

1044. CMRS customers may travel from location to location during the course of a single call, which could make it difficult to determine the applicable transport and termination rate or access charge.[2487] We recognize that, using current technology, it may be difficult for CMRS providers to determine, in real time, which cell site a mobile customer is connected to, let alone the customer's specific geographic location.[2488] This could complicate the computation of traffic flows and the applicability of transport and termination rates, given that in certain cases, the geographic locations of the calling party and the called party determine whether a particular call should be compensated under transport and termination rates established by one state or another, or under interstate or intrastate access charges. We conclude, however, that it is not necessary for incumbent LECs and CMRS providers to be able to ascertain

[2485] "[S]ome cellular carriers provide their customers with a service whereby a call to a subscriber's local cellular number will be routed to them over interstate facilities when the customer is "roaming" in a cellular system in another state. In this case, the cellular carrier is providing not local exchange service but interstate, interexchange service. In this and other situations where a cellular company is offering interstate, interexchange service, the local telephone company providing interconnection is providing exchange access to an interexchange carrier and may expect to be paid the appropriate access charge . . . . Therefore, to the extent that a cellular operator does provide interexchange service through switching facilities provided by a telephone company, its obligation to pay carrier's carrier [*i.e.*, access] charges is defined by § 69.5(b) of our rules." *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, 59 RR 2d 1275, 1284-85 n.3 (1986). *See also Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1497-98 (1994) (concluding that there should be no distinction between incumbent LECs' interconnection arrangements with cellular carriers and those with other CMRS providers).

[2486] *See also, supra,* XI.A.2.c.(1).

[2487] In the *LEC-CMRS Interconnection NPRM*, we observed that a significant amount of LEC-CMRS traffic crosses state lines, because CMRS service areas often cross state lines and CMRS customers are mobile. *LEC CMRS Interconnection NPRM* at para. 112.

[2488] *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, RM-8143, Report and Order and Further Notice of Proposed Rulemaking, FCC 96-264 at paras. 8-9 (adopted June 12, 1996, released July 26, 1996).

geographic locations when determining the rating for any particular call at the moment the call is connected. We conclude that parties may calculate overall compensation amounts by extrapolating from traffic studies and samples. For administrative convenience, the location of the initial cell site when a call begins shall be used as the determinant of the geographic location of the mobile customer. As an alternative, LECs and CMRS providers can use the point of interconnection between the two carriers at the beginning of the call to determine the location of the mobile caller or called party.

1045. As discussed above, pursuant to section 251(b)(5) of the Act, all local exchange carriers, including small incumbent LECs and small entities offering competitive local exchange services, have a duty to establish reciprocal compensation arrangements for the transport and termination of local exchange service. CMRS providers, including small entities, and LECs, including small incumbent LECs and small entity competitive LECs, will receive reciprocal compensation for terminating certain traffic that originates on the networks of other carriers, and will pay such compensation for certain traffic that they transmit and terminate to other carriers. We believe that these arrangements should benefit all carriers, including small incumbent LECs and small entities, because it will facilitate competitive entry into new markets while ensuring reasonable compensation for the additional costs incurred in terminating traffic that originates on other carriers' networks. We also recognize that, to implement transport and termination pursuant to section 251(b)(5), carriers, including small incumbent LECs and small entities, may be required to measure the exchange of traffic, but we believe that the cost of such measurement to these carriers is likely to be substantially outweighed by the benefits of these arrangements.[2489]

3. Pricing Methodology

a. Background

1046. In the NPRM, we sought comment on how to interpret section 252(d)(2) of the Act. Specifically, we asked if we should establish a generic pricing methodology or impose a ceiling to guide the states in setting the charge for the transport and termination of traffic. We also asked whether such a generic pricing methodology or ceiling should be established using the same principles we adopt for interconnection and unbundled elements.[2490] Additionally, we sought comment on the use of an interim and transitional pricing mechanism that would address concerns about unequal bargaining power in negotiations.[2491]

[2489] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

[2490] NPRM at para. 234.

[2491] NPRM at para. 244.

b. Comments

1047. Time Warner argues that call termination is an essential element in completing calls and that this last "bottleneck" should be governed by a lower cost standard than elements that are based on a competitor's "make or buy decisions."[2492] MCI contends that the level of compensation for transport and termination should be determined by calculating the TSLRIC incurred by the incumbent in providing the network elements necessary to terminate the local calls originating on the networks of its competitors, and converting that cost to a per-minute rate.[2493] Cox asserts that section 252(d)(2) requires that competing carriers have mutual obligations to terminate traffic that originates on competitors' networks, and that this obligation requires that the rate for transport and termination be less than the rate charged for unbundled elements.[2494] Cox advocates the use of LRIC, as opposed to TSLRIC, methodology to set transport and termination rates because LRIC recognizes only the cost of capital expenditures to provide the additional terminations and transport required by a competitive local service provider, including maintenance and depreciation of those facilities, without any allocation of overhead.[2495]

1048. BellSouth argues that the recovery of transport and termination costs should include joint and common costs and that no LEC can charge rates for transport and termination in excess of access charges because potential customers would simply choose arrangements under the latter.[2496] The Western Alliance asserts that rates for the transport and termination of traffic must allow rural LECs to recover the incremental cost of local access, a reasonable apportionment of joint and common costs, and any lost contribution to basic, local service rates represented by the interconnecting carriers' service.[2497] The Western Alliance argues that recovery of lost contribution is especially important for smaller LECs because they are unlikely to have alternative sources from which to support basic service rates.[2498] USTA argues rates should be based on existing prices (*i.e.* access charges) because this would not require small and mid-sized incumbent LECs to conduct cost studies that could bog down the interconnection negotiation

[2492] Time Warner comments at 50. "Make or buy decision" is Time Warner's term for deciding between providing services through its own facilities or through resale and/or purchasing unbundled elements.

[2493] MCI comments at 48-49; *see also* NCTA comments at 47-50; Comcast comments at 22; Competition Policy Institute reply at 15.

[2494] Cox comments at 34; *see also* Sprint Spectrum/APC comments at 8-9.

[2495] Cox comments at 25-26; *see also* GST comments at 38-40; MFS comments at 80-81. We note above that TSLRIC is one instance of LRIC where the increment chosen is the provision of the entire service.

[2496] BellSouth comments at 70-72; *see also* MECA comments at 5; and Mass. Commission comments at 8-9.

[2497] Western Alliance comments at 5.

[2498] *Id. at* 7 n. 14.

process.[2499] GTE claims that the "additional costs incurred" language undermines the contention that cost studies must assume the most efficient technology available because costs are incurred using actual network technology, not a theoretical network.[2500]

1049. The Illinois Commission asserts that the two different pricing standards in sections 252(d)(1)(A)(i) and 252(d)(2)(A)(ii) are not mutually exclusive and the text of the two provisions does not prohibit the states from using identical pricing standards for the two categories of service. The Illinois Commission notes that there is some substitutability between unbundled network elements and incumbent LEC transport and termination of a competitor's traffic. Consequently, the Illinois Commission contends that two widely disparate policies for the pricing of these services may have potentially distorting effects.[2501] The Illinois Commission further argues that section 252(d)(2)(B)(ii) does not prohibit rate regulation proceedings to establish transport and termination costs and does not bar a state from requiring carriers to maintain records regarding transport and termination costs, if authority exists independently of the 1996 Act.[2502] GST argues that section 252(d)(2)(B)(ii)'s prohibition against use of cost studies to set transport and termination rates suggests Congress intended for compensation prices to be set on the basis of economically relevant costs, not on the basis of artificial regulatory mechanisms, such as separations, revenue requirements, or a carrier's embedded investment.[2503]

1050. The Ohio Commission asserts that states should establish a price ceiling for transport and termination of local traffic on the basis of an imputation test. The Ohio Commission argues that the ceiling price for transport and termination of local traffic should be such that it allows the incumbent LEC to pass an imputation test for local traffic in the aggregate (*i.e.*, flat-rated, message, and measured local residence and business traffic) at the end user rate levels.[2504] Similarly, MFS suggests that the Commission adopt a rate equal to one half of the retail rate because, as a general rule, call origination and billing can be presumed to be equal to the cost of transport and termination.[2505] Jones Intercable contends that the

[2499] USTA comments at 54-55.

[2500] GTE reply at 30; *see also* PacTel reply at 45-46.

[2501] Illinois Commission comments at 76-77; *see also* California Commission comments at 42; ACSI comments at 10-11; Ohio Commission comments at 70-71; Texas Public Utility Counsel comments at 1, 50; Lincoln Tel. comments at 20; Citizens Utilities comments at 32-33.

[2502] Illinois Commission comments at 78; *see also* California Commission comments at 43-44.

[2503] GST comments at 39.

[2504] Ohio Commission comments at 71-72, 78-79.

[2505] MFS comments at 87.

Commission should establish a presumption that all LECs can offer traffic termination at a rate that is no higher than the lowest rate that has been agreed to (or imposed through arbitration) for such traffic termination by *any* LEC. Jones Intercable adds that such a rule is immensely practical because it relieves competitors of the need to fight the same battle in all fifty states.[2506]

1051. The California Commission asserts that ceilings for transport and termination present problems because a ceiling based on, for example, switched access rates would have to take into account widely varying rates among states. The California Commission is also opposed to price floors for call termination because they may conflict with bill-and-keep arrangements.[2507] GST opposes the use of access charges to set reciprocal transport and termination rates because access charges are fundamentally based on rates of return.[2508] TCI argues that there has been sufficient evidence compiled in state proceedings for the Commission to determine the price ceiling based on existing TSLRIC studies and suggests a price ceiling of 0.4 cents per minute of use.[2509] The Illinois and Maryland commissions have adopted rates for the termination of traffic based on incremental cost studies. The Illinois Commission has adopted a rate equal to 0.5 cents ($0.005) per minute of use for termination from the end office switch. Maryland has adopted a rate equal to 0.3 cents ($0.003) per minute of use for termination from the end office switch. Both commissions adopted slightly higher rates for transport and termination via tandem switches equal to 0.5 cents ($0.005) in Maryland and 0.75 cents ($0.0075) in Illinois.[2510]

1052. Most commenters support the requirement that dedicated transport services be priced on a flat-rated basis.[2511] For example, the Ohio Commission asserts that all LECs should offer a reciprocal compensation structure that consists of both flat-rated elements and usage-sensitive elements, in order to satisfy the requirement that the rate structure reflect the way in which costs are incurred by the providing LEC.[2512] According to Lincoln Telephone, the connection between an incumbent LEC's central office and

[2506] Jones Intercable comments at 29-30.

[2507] California Commission comments at 43; *see also* Florida Commission comments at 40 (setting charges for the transport and termination of local exchange traffic should be left up to the states because of the unique geographical and demographic characteristics of each state).

[2508] GST comments at 39-40.

[2509] TCI comments at 40-43.

[2510] These cost studies, and others, are discussed in greater detail in *supra*., Section VII.C.3.

[2511] *See, e.g.*, USTA comments at 80; Time Warner comments at 91-92; NEXTLINK comments at 34-35; Mass. Attorney General comments at 16-17, 22-23; CFA/CU comments at 51; Washington Commission comments at 3; Sprint comments at 79.

[2512] Ohio Commission comments at 68-69.

an interconnector's network should be priced as a flat-rated unbundled network element.[2513] The Massachusetts Attorney General recommends that termination charges be flat-rated and capacity-based.[2514] This capacity-based, flat-rated reciprocal compensation charge would be based on port charges, measured at the peak busy hour of the month, to determine the relative traffic flow over the respective networks. The Massachusetts Attorney General further argues that, in a highly competitive market where services and prices would be continuously changing, rates charged by minutes of use will distort marketing and investment decisions away from the efficient path.[2515] Cox contends capacity-cost approaches should be used as the basic standard for setting transport and termination rates because costs are incurred in that manner.[2516] Additionally, Cox argues a capacity-cost approach addresses peak-load pricing problems because an interconnecting carrier is effectively reserving and paying for a slice of capacity on a full-time basis.[2517] Other carriers support a per-minute charge for transport and termination.[2518] In addition to a rate based on minutes of use, the Maryland Commission does not oppose flat-rated options for termination of traffic based on capacity costs measured at peak hours.[2519] BellSouth adds that usage-based charging is relatively more favorable to smaller competitors and facilities-based charging is relatively more favorable to larger competitors.[2520]

1053. Numerous new entrants and state commissions support the use of an interim pricing mechanism and support the use of bill and keep as such an interim measure.[2521] In the *LEC-CMRS Interconnection* proceeding, most CMRS providers argue in support of an interim pricing approach for transport and termination arrangements while long-term solutions are pursued.[2522] Cincinnati Bell asserts that the suggestion that an interim mechanism may be necessary to offset bargaining power of incumbent

[2513] Lincoln Tel. comments at 22.

[2514] Mass. Attorney General comments at 15-16.

[2515] Mass. Attorney General comments at 16-17; *see also* CFA/CU comments at 55-56; Washington Commission comments at 3.

[2516] Cox comments at Exhibit 3 (Bargaining Incentives and Interconnection), p. 7.

[2517] *Id.*

[2518] *See, e.g.,* MCI comments at 48-49; SBC comments at 50 n.91.

[2519] Maryland Commission comments at Attachment (Maryland Commission Order No. 72348), p. 33.

[2520] BellSouth comments at Attachment (Interconnection and Economic Efficiency), p. 11.

[2521] *See, e.g.,* GST comments at 34-35; AT&T comment at 69; Cox comments at 27-28, 38; Sprint comments at 87; Jones Intercable comments at 28-29; Citizens Utilities comments at 30; Telecommunication Resellers Ass'n comments at 54-55.

[2522] *See, e.g.*, AirTouch comments in CC Docket No. 95-185 at 38-39.

LECs incorrectly assumes that the incumbent LEC will always have greater bargaining power in the process of negotiations.[2523] Cincinnati Bell argues that, to the contrary, small and mid-size LECs will be at a disadvantage when they negotiate with large corporations.[2524] LECs generally argue that, under the 1996 Act, the Commission is precluded from creating an interim pricing regime, and point to section 251(d)(3), which preserves state regulations over the obligations of LECs in certain circumstances, to support their argument.[2525]

c. Discussion

(1) Statutory Standard

1054. We conclude that the pricing standards established by section 252(d)(1) for interconnection and unbundled elements, and by section 252(d)(2) for transport and termination of traffic, are sufficiently similar to permit the use of the same general methodologies for establishing rates under both statutory provisions. Section 252(d)(2) states that reciprocal compensation rates for transport and termination shall be based on "a reasonable approximation of the additional costs of terminating such calls."[2526] Moreover, there is some substitutability between the new entrant's use of unbundled network elements for transporting traffic and its use of transport under section 252(d)(2). Depending on the interconnection arrangements, carriers may transport traffic to the competing carriers' end offices or hand traffic off to competing carriers at meet points for termination on the competing carriers' networks. Transport of traffic for termination on a competing carrier's network is, therefore, largely indistinguishable from transport for termination of calls on a carrier's own network. Thus, we conclude that transport of traffic should be priced based on the same cost-based standard, whether it is transport using unbundled elements or transport of traffic that originated on a competing carrier's network. We, therefore, find that the "additional cost" standard permits the use of the forward-looking, economic cost-based pricing standard that we are establishing for interconnection and unbundled elements.[2527]

[2523] Cincinnati Bell comments at 25-26.

[2524] *Id.*

[2525] *See*, *e.g.*, BellSouth comments in CC Docket No. 95-185 at 32.

[2526] 47 U.S.C. § 252(d)(2)(A)(ii).

[2527] *See supra,* Section VII.B.

(2) Pricing Rule

1055. States have three options for establishing transport and termination rate levels. A state commission may conduct a thorough review of economic studies prepared using the TELRIC-based methodology outlined above in the section on the pricing of interconnection and unbundled elements.[2528] Alternatively, the state may adopt a default price pursuant to the default proxies outlined below. If the state adopts a default price, it must either commence review of a TELRIC-based economic cost study, request that this Commission review such a study, or subsequently modify the default price in accordance with any revised proxies we may adopt. As previously noted, we intend to commence a future rulemaking on developing proxies using a generic cost model, and to complete such proceeding in the first quarter of 1997. As a third alternative, in some circumstances states may order a "bill and keep" arrangement, as discussed below.

(3) Cost-Based Pricing Methodology

1056. Consistent with our conclusions about the pricing of interconnection and unbundled network elements, we conclude that states that elect to set rates through a cost study must use the forward-looking economic cost-based methodology, which is described in greater detail above, in establishing rates for reciprocal transport and termination when arbitrating interconnection arrangements.[2529] We find that section 252(d)(2)(B)(ii), which indicates that section 252(d)(2) shall not be construed to "authorize the Commission or any State to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls,"[2530] does not preclude states or this Commission from reviewing forward-looking economic cost studies. First, we believe that Congress intended the term "rate regulation proceeding" in section 252(d)(2)(B)(ii) to mean the same thing as "a rate-of-return or other rate-based proceeding" in section 252(d)(1)(A)(i). In the section on the pricing of interconnection and unbundled elements above, we conclude that the statutory prohibition of the use of such proceedings is intended to foreclose the use of traditional rate case proceedings using rate-of-return regulation. Moreover, forward-looking economic cost studies typically involve "a reasonable approximation of the additional cost,"[2531] rather than determining such costs "with particularity," such as by measuring labor costs with detailed time and motion studies.

[2528] *Id.*

[2529] *See supra,* Section VII.B. for a complete discussion of forward-looking economic cost-based methodology.

[2530] 47 U.S.C. § 252(d)(2)(B)(ii).

[2531] 47 U.S.C. § 252(d)(2)(A)(ii).

1057. We find that, once a call has been delivered to the incumbent LEC end office serving the called party, the "additional cost" to the LEC of terminating a call that originates on a competing carrier's network primarily consists of the traffic-sensitive component of local switching. The network elements involved with the termination of traffic include the end-office switch and local loop. The costs of local loops and line ports associated with local switches do not vary in proportion to the number of calls terminated over these facilities.[2532] We conclude that such non-traffic sensitive costs should not be considered "additional costs" when a LEC terminates a call that originated on the network of a competing carrier. For the purposes of setting rates under section 252(d)(2), only that portion of the forward-looking, economic cost of end-office switching that is recovered on a usage-sensitive basis constitutes an "additional cost" to be recovered through termination charges.

1058. Rates for termination established pursuant to a TELRIC-based methodology may recover a reasonable allocation of common costs. A rate equal to incremental costs may not compensate carriers fully for transporting and terminating traffic when common costs are present. We therefore reject the argument by some commenters that "additional costs" may not include a reasonable allocation of forward-looking common costs. We recognize that, as noted by Time Warner, call termination is an essential element in completing calls because competitors are required to use the incumbent LECs' existing networks to terminate calls to incumbent LEC customers.[2533] The 1996 Act envisions a seamless interconnection of competing networks, rather than the development of redundant, ubiquitous networks throughout the nation. In order to terminate traffic ubiquitously to other companies' local customers, all LECs are given the right to use termination services from those companies rather than construct facilities to everyone. While, on the originating end, carriers have different options to reach their revenue-paying customers -- including their own network facilities, purchasing access to unbundled elements of the incumbent LEC, or resale -- they have no realistic alternatives for terminating traffic destined for competing carriers' subscribers other than to use those carriers' networks. Thus, all carriers -- incumbent LECs as well as competing carriers -- have a greater incentive and opportunity to charge prices in excess of economically efficient levels on the terminating end. To ensure that rates for reciprocal compensation make possible efficient competitive entry, we conclude that termination rates should include an allocation of forward-looking common costs that is no greater proportionally than that allocated to unbundled local loops, which, as discussed above, should be relatively low.[2534] Additionally, we conclude that rates for the transport and termination of traffic shall not include an element that allows incumbent LECs to recover any lost contribution to basic, local service rates represented by the interconnecting carriers' service, because such an element would be inconsistent with the

[2532] The duty to terminate calls that originate on the network of a competitor does not directly affect the number of calls routed to a particular end user and any costs that result from inadequate loop capacity are, therefore, not considered "additional costs."

[2533] Time Warner comments at 50.

[2534] *See supra,* Section VII.C.2.b.(1).

statutory requirement that rates for transport and termination be based on additional costs.[2535] In the section addressing prices for unbundled elements we conclude that the ECPR, which would allow incumbent LECs to recover such lost contributions, or collection of universal service costs through interconnection rates, leads to significant distortions in markets when existing retail prices are not cost-based.[2536]

1059. We also address the impact on small incumbent LECs. For example, the Western Alliance argues that it is especially important for small LECs to recover lost contributions and common costs through termination charges. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, we conclude that termination rates for all LECs should include an allocation of forward-looking common costs, but find that the inclusion of an element for the recovery of lost contribution may lead to significant distortions in local exchange markets. We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act.

(4) Default Proxies

1060. As with unbundled network elements, we recognize that it may not be feasible for some state commissions conducting or reviewing economic studies to establish transport and termination rates using our TELRIC-based pricing methodology within the time required for the arbitration process, particularly given some states' resource limitations. Thus, for the time being, we adopt a default price range of 0.2 cents ($0.002) to 0.4 cents ($0.004) per minute of use for calls handed off at the end-office switch. This default price range is based on the same proxies that apply to local switching as an unbundled network element. In establishing end-office termination rates, states may adopt a default termination price that is within our default price range or at either of the end points of the range. States should articulate the basis for selecting a particular price within this range. Thus, in arbitration proceedings, states must set the price for end office termination of traffic by: (1) using a forward-looking, economic cost study that complies with the forward-looking, economic-cost methodology set forth above; or (2) adopting a price less than or equal to 0.4 cents ($0.004) per minute, and greater than or equal to 0.2 cents ($0.002) per minute, pending the completion of such a forward-looking, economic cost study. We observe that the most credible studies in the record before us fall at the lower end of this range, and we encourage states to consider such evidence in their analysis. The adoption of a range of rates to serve as a default price range for interconnection agreements being arbitrated by the states provides carriers with a clearer understanding of the terms and

[2535] *See* 47 U.S.C. § 252(d)(2).

[2536] *See supra*, Section VII.B.2.b. for a discussion of the effect application of the ECPR would have on the market for local exchange service.

conditions that will govern them if they fail to reach an agreement and helps to reduce the transaction costs of arbitration and litigation. We also find that states that have already adopted end-office termination rates based on an approach other than a full forward-looking cost study, either through arbitration or rulemaking proceedings, may keep such rates in effect, pending their review of a forward-looking cost study, as long as they do not exceed 0.5 cents ($0.005) per minute. As discussed below, a state may also order a "bill and keep" arrangement subject to certain limitations. Additionally, our adoption of a default price range temporarily relieves small and mid-sized carriers from the burden of conducting forward-looking economic cost studies.[2537]

1061. Similarly, in establishing transport rates under sections 251(b)(5) and 252(d)(2), state commissions should be guided by the price proxies that we are establishing for unbundled transport elements discussed above.[2538] States should explain the basis for selecting a particular default price subject to the applicable ceiling. Specifically, when interconnecting carriers hand off traffic at an incumbent LEC's tandem switch (or equivalent facilities of a carrier other than an incumbent LEC), the rates for the tandem switching and transmission from the tandem switch to end offices -- a portion of the "transport" component of transport and termination rates -- should be subject to the proxies that apply to the analogous unbundled network elements. Thus, for the time being, when states set rates for tandem switching under section 252(d)(2), they may set a default price at or below the default price ceiling that applies to the tandem switching unbundled element as an alternative to reviewing a forward-looking economic cost study using our TELRIC methodology.[2539] Similarly, when states set rates for transmission facilities between tandem switches and end offices, they may establish rates equal to the default prices we are adopting for such transmission, as discussed above in the section on unbundled elements.[2540]

1062. Finally, in establishing the rates for transmission facilities that are dedicated to the transmission of traffic between two networks, state commissions should be guided by the default price level we are adopting for the unbundled element of dedicated transport.[2541] For such dedicated transport, we can envision several scenarios involving a local carrier that provides transmission facilities (the "providing carrier") and another local carrier with which it interconnects (the "interconnecting carrier"). The amount an interconnecting carrier pays for dedicated transport is to be proportional to its relative use of the dedicated facility. For example, if the providing carrier provides one-way trunks that the interconnecting carrier uses

[2537] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

[2538] *See supra,* Section VII.C.2.b.(3).

[2539] *Id.*

[2540] *Id.*

[2541] *Id.*

exclusively for sending terminating traffic to the providing carrier, then the interconnecting carrier is to pay the providing carrier a rate that recovers the full forward-looking economic cost of those trunks. The interconnecting carrier, however, should not be required to pay the providing carrier for one-way trunks in the opposite direction, which the providing carrier owns and uses to send its own traffic to the interconnecting carrier. Under an alternative scenario, if the providing carrier provides two-way trunks between its network and the interconnecting carrier's network, then the interconnecting carrier should not have to pay the providing carrier a rate that recovers the full cost of those trunks. These two-way trunks are used by the providing carrier to send terminating traffic to the interconnecting carrier, as well as by the interconnecting carrier to send terminating traffic to the providing carrier. Rather, the interconnecting carrier shall pay the providing carrier a rate that reflects only the proportion of the trunk capacity that the interconnecting carrier uses to send terminating traffic to the providing carrier. This proportion may be measured either based on the total flow of traffic over the trunks, or based on the flow of traffic during peak periods.[2542] Carriers operating under arrangements which do not comport with the principles we have set forth above, shall be entitled to convert such arrangements so that each carrier is only paying for the transport of traffic it originates, as of the effective date of this order.

(5) Rate Structure

1063. Nearly all commenters agree that flat rates, rather than usage-sensitive rates, should apply to the purchase of dedicated facilities. As discussed in the NPRM, economic efficiency may generally be maximized when non-traffic sensitive services, such as the use of dedicated facilities for the transport of traffic, are priced on a flat-rated basis.[2543] We, therefore, require all interconnecting parties to be offered the option of purchasing dedicated facilities, for the transport of traffic, on a flat-rated basis. As discussed by Lincoln Telephone, the connection between an incumbent LEC's end or tandem office and an interconnecting LEC's network is likely to be a dedicated facility. We recognize that the facility itself can be provided in a number of different ways -- by use of two service providers, by the other carrier, or jointly in a meet-point arrangement. We conclude first that, no matter what the specific arrangements, these costs should be recovered in a cost-causative manner and that usage-based charges should be limited to situations where costs are usage sensitive. In cases going to arbitration and in reviewing BOC statements of terms and conditions, the carrier actually providing the facility should presumptively be entitled to a rate that is set based on the forward-looking economic cost of providing the portion of the facility that is used for terminating traffic that originates on the network of a competing carrier. We recognize that negotiated agreements may incorporate flat-rated charges when it is efficient to do so and find that the presence of the arbitration default rule is likely to lead parties to negotiate efficient rate structures.

[2542] *See infra,* Section XI.A.3.c.(5).

[2543] NPRM at para. 150.

1064. We recognize that the costs of transporting and terminating traffic during peak and off-peak hours may not be the same. As suggested by the Massachusetts Attorney General, rates that are the same during peak and off-peak hours may not reflect the cost of using the network and could lead to inefficient use of the network. The differences in the cost of transporting and terminating traffic during peak and off-peak hours, however, are likely to vary depending on the network, and the amount and type of traffic terminated at a particular switch. For example, peak periods may vary within a local service area depending upon whether the switch is located in a business or residential area. As a result, there may be administrative difficulties in establishing peak-load pricing schemes that may outweigh the benefits of such schemes. The negotiating parties, however, are likely to be in a position to more accurately determine how traffic patterns will adjust to peak-load pricing schemes and we encourage parties to address such pricing schemes in the negotiation process. For similar reasons, we neither require nor forbid states from adopting rates that reflect peak and off-peak costs. We hope some states will evaluate the benefits and costs of pricing schemes that consist of different rates for peak and off-peak traffic. We do require, however, that peak-load pricing schemes, adopted through the arbitration process, comply with our default price level if not based on a forward-looking cost study (*e.g.*, the average rate, weighted by the projected relative minutes of use during peak and off-peak periods, should fall within our default price range of 0.2 to 0.4 cents or the level determined by an incremental cost study).

(6) Interim Transport and Termination Rate Levels

1065. We are concerned that some new entrants that do not already have interconnection arrangements with incumbent LECs may face delays in initiating service solely because of the need to negotiate transport and termination arrangements with the incumbent LEC. In particular, a new entrant that has already constructed facilities may have a relatively weak bargaining position because it may be forced to choose either to accept transport and termination rates not in accord with these rules or to delay its commencement of service until the conclusion of the arbitration and state approval process. To promote the Act's goal of rapid competition in the local exchange, we order incumbent LECs upon request from new entrants to provide transport and termination of traffic, on an interim basis, pending resolution of negotiation and arbitration regarding transport and termination prices, and approval by the state commission. A carrier may take advantage of this interim arrangement only after it has requested negotiation with the incumbent LEC. The interim arrangement shall cease to be in effect when one of the following occurs: (1) an agreement has been negotiated and approved; (2) an agreement has been arbitrated and approved; or (3) the period for requesting arbitration has passed with no such request. We also conclude that interim prices for transport and termination shall be symmetrical. Because the purpose of this interim termination requirement is to permit parties without existing interconnection agreements to enter the market expeditiously, this requirement shall not apply with respect to requesting carriers that have existing interconnection arrangements that provide for termination of local traffic by the incumbent LEC. The ability to interconnect with an incumbent LEC prior to the completion of a forward-looking, economic cost study, based on an interim presumptive price ceiling, allows carriers, including small entrants, to enter into local exchange service expeditiously.[2544]

1066. In states that have already conducted or reviewed forward-looking economic cost studies and promulgated transport and termination rates based on such studies, an incumbent LEC receiving a request for interim transport and termination shall use these state-determined rates as interim transport and termination rates. In states that have not conducted or reviewed a forward-looking economic cost study, but have set rates for transport and termination of traffic consistent with the default price ranges and ceilings discussed above, an incumbent LEC shall use these state-determined rates as interim rates.[2545] In states that have neither set rates consistent with the default price ceilings and ranges nor reviewed or conducted forward-looking economic cost studies, we must establish an interim default price in order to facilitate rapid competition in the local exchange market. In those states, an incumbent LEC shall set interim rates at the default ceilings for end-office switching (0.4 cents per minute of use), tandem switching (0.15 cents per minute of use), and transport described above.[2546] Using the ceiling as a default interim price, pending a state commission's completion of a forward-looking economic cost analysis, should ensure that both the incumbent LEC and the competing provider recovers no less than their full transport and termination costs. We note, however, that the most credible evidence in the record suggests that the actual forward-looking economic cost of end-office switching is closer to 0.2 cents ($0.002) per minute of use than the ceiling of 0.4 cents ($0.004) per minute of use.[2547] States must adopt "true-up" mechanisms to ensure that no carrier is disadvantaged by an interim rate that differs from the final rate established pursuant to arbitration.

1067. We conclude that section 251, in conjunction with our broad rulemaking authority under section 4(i), provides us with authority to create interim pricing rules to facilitate market entry. Because section 251(d)(1) gives the FCC authority "to establish regulations to implement the requirements of this section," we find that section 251(d)(1) gives the Commission authority to establish interim regulations that address the "just and reasonable" rates for the "reciprocal compensation" requirement of section 251(b)(5), subject to the preservation requirements of section 251(d)(3). Courts have upheld our adoption of interim compensation arrangements pursuant to our authority under section 4(i) of the 1934 Communications Act on numerous occasions in the past.[2548] In particular, we have authority, under section 4(i), to set interim

[2544] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

[2545] *See supra*, Section XI.A.3.c.(4).

[2546] *Id.*

[2547] *See supra*, Section XI.A.3.c.(4).

[2548] *See New England Tel. and Tel . Co. v. FCC*, 826 F.2d 1101 (D.C. Cir 1987); *North American Telecommunications Association v. FCC*, 772 F.2d 1092 (7th Cir. 1085); *Lincoln Tel. and Tel. Co. v. FCC*, 659 F.2d (D.C. Cir. 1989).

rates subject to a later "true-up" when final rates are established.[2549] We therefore conclude that the default prices discussed above need not in all instances await the conclusion of the negotiation, arbitration, and state approval process set forth in section 252, but must nevertheless be in accordance with the requirements of section 251(d)(3) preserving state access regulations. We also observe that we proposed a similar interim transport and termination arrangement, albeit with different rate levels, in our NPRM in the *LEC-CMRS Interconnection* proceeding.[2550]

1068. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, Cincinnati Bell asserts that interim mechanisms are not required because large corporations are not disadvantaged by unequal bargaining power in negotiations with small and mid-size incumbent LECs. We do not adopt Cincinnati Bell's position because some new entrants, regardless of their size, that do not already have interconnection arrangements with incumbent LECs may face delays in initiating service solely because of the need to negotiate transport and termination arrangements with the incumbent LEC. We believe that the adoption of interim rates, subject to a "true-up," advances the pro-competitive goals of the statute. We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act.

4. Symmetry

a. Background

1069. Symmetrical compensation arrangements are those in which the rate paid by an incumbent LEC to another telecommunications carrier for transport and termination of traffic originated by the incumbent LEC is the same as the rate the incumbent LEC charges to transport and terminate traffic originated by the other telecommunications carrier. Incumbent LECs are not likely to purchase interconnection or unbundled elements from competitive LECs, except for termination of traffic, and

[2549] "[T]he Commission's establishment of an interim billing and collection arrangement was both a helpful and necessary step for the Commission to take in implementing its 'immediate' interconnection order." *Lincoln Telephone & Telegraph Co. v. FCC*, 659 F.2d 1092, 1107 (D.C.Cir.1981) (upholding Commission decision requiring an incumbent LEC to interconnect with MCI immediately, in order not to delay interconnection, at interim rates subject to later adjustments); *see also FTC Communications v. FCC*, 750 F.2d 226 (2d Cir.1984) (affirming Commission's authority under Section 4(i) to set interim rates for interconnection between the domestic record carrier, Western Union, and international record carriers, subject to an accounting order, pending the conclusion of a rulemaking to set permanent rates replacing expired, contract-based rates).

[2550] *LEC-CMRS Interconnection NPRM* at para. 60.

possibly transport.[2551] In the NPRM, we sought comment on whether rate symmetry requirements are consistent with the statutory requirement that rates set by states for transport and termination of traffic be based on "costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier," and "a reasonable approximation of the additional costs of terminating such calls."[2552]

1070. In addition, we noted in the NPRM that the Illinois, Maryland, and New York commissions have established different rates for termination of traffic on an incumbent LEC's network, depending upon whether the traffic is handed off at the incumbent LEC's end office or tandem switch.[2553] We also observed that California and Michigan have established one rate that applies to transport and termination of all competing local exchange carrier traffic on incumbent LEC networks, regardless of whether the traffic is handed off at the incumbent LEC's end office or tandem switch, although this rate does not currently apply to CMRS.[2554] We, therefore, address whether rates for transport and termination should be symmetrical and consist of only a single rate regardless of where the call is handed off, or if rates should be priced on an element-by-element basis.

1071. In the *LEC-CMRS Interconnection NPRM*, we sought comment on whether incumbent LECs were utilizing their greater bargaining power to negotiate with wireless carriers interconnection agreements that did not reflect principles of mutual compensation. We sought comment on whether we should institute some procedure or mechanism in addition to our section 208 enforcement process to ensure that incumbent LECs comply with our existing rules requiring mutual compensation.[2555]

b. Comments

1072. *Local Competition NPRM*. Incumbent LECs argue that a symmetrical reciprocal compensation requirement does not comport with the Act.[2556] GTE contends that the symmetry rule violates the requirement of section 252(d)(2) that rates be based on a reasonable estimate of the additional

[2551] NPRM at para. 235.

[2552] 47 U.S.C. § 252(d)(2).

[2553] NPRM at para. 239.

[2554] *Id.*

[2555] *LEC-CMRS Interconnection NPRM*, para. 81.

[2556] *See, e.g.,* BellSouth comments at 72-73; SBC comments at 51-52; GTE reply at 29.

costs of transport and termination.[2557] In addition, Lincoln Telephone argues that rates for the transport and termination of traffic should not be symmetrical because small and mid-sized companies can incur higher costs transporting and terminating traffic than larger carriers.[2558] TDS argues that a symmetrical pricing standard fails to fulfill the basic statutory directive that each carrier recover its costs.[2559] BellSouth contends that, because the costs of an incumbent LEC and new entrant are likely to be quite different, the Commission does not have the authority to contravene the mutual and reciprocal recovery language of section 252(d)(2) and require symmetry.[2560] Furthermore, MECA, which represents Michigan exchange carriers, asserts that competing LECs should be required to compensate each other for terminating traffic at a cost-based rate for each carrier.[2561] MECA argues that compensation rates cannot be uniform because each carrier has its own unique cost structure.[2562] RTC also asserts that proposals such as symmetry do not consider the costs involved in the use of another's carriers network.[2563]

1073. On the other hand, state commissions, as well as several other commenters, support symmetrical reciprocal compensation mechanisms.[2564] Several commenters contend that symmetrical rates are mutual and reciprocal, and therefore only symmetrical rates can satisfy the statutory standards required under section 252(d)(2).[2565] MFS notes that Congress required that compensation rates be "mutual and reciprocal" and based on a "reasonable approximation of additional costs," and expressly prohibited any requirement of actual cost studies.[2566] According to MFS "these interrelated provisions indicate Congress's intention that optimal economic costs, rather than actual or historical costs, should be used in setting these

[2557] GTE reply at 29.

[2558] Lincoln Tel. reply at 11-12.

[2559] TDS comments at 23.

[2560] BellSouth comments at 72-73.

[2561] MECA comments at 67.

[2562] *Id.*; *see also* Lincoln Tel. reply at 11.

[2563] RTC comments at 23.

[2564] *See, e.g.,* Alabama Commission comments at 32; AT&T comments at 69; Louisiana Commission comments at 7-8; Mass. Commission comments at 13; MCI comments at 50.

[2565] MFS comments at 82-83; GST comments at 40-42; *see also* Texas Public Utility Counsel comments at 52-54 (arguing that symmetrical rates are consistent with the Act as long as rates are based on TSLRIC).

[2566] MFS comments at 82.

rates."[2567] MFS also argues that, while actual costs may vary from one carrier to the next, the optimal economic cost of performing the transport and termination function is the same for all carriers operating within the same geographic area.[2568] Therefore, it asserts that *"[o]nly* symmetrical rates are 'mutual and reciprocal,' and only such rates are consistent with the provisions of Sec. 252(d)(2)."[2569]

1074. Several potential new entrants believe that requiring symmetrical reciprocal compensation is needed to ensure efficient competition.[2570] MCI argues that the reciprocal compensation will be of much greater importance to competing carriers than to incumbent LECs because initially calls terminating on other carriers' networks will account for a far greater share of entrants' traffic than is the case for incumbent LECs, which will still be terminating most of their local traffic on their own networks.[2571] Therefore, MCI asserts that the compensation rate charged for transport and termination will comprise a significant portion of the competing carrier's overall cost of providing service.[2572] MCI argues that incumbent LECs have every reason to attempt to use their superior bargaining position in negotiations to obtain termination rates that are as high as possible, and asserts that a symmetrical compensation rate will reduce the incentive of incumbent LECs to inflate their termination rates.[2573] In addition, MFS asserts that asymmetrical rates burden new entrants because incumbent LECs have greater bargaining power and access to information.[2574] The Alabama Commission contends that equal rates eliminate incumbent LECs' ability to exploit the system.[2575]

1075. Some prospective local entrants contend that requiring symmetrical reciprocal compensation arrangements will lead to economically efficient outcomes.[2576] MFS contends that setting symmetrical rates

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[2567] *Id.*

[2568] *Id.*; *see also* Texas Public Utility Counsel comments at 52-54 (arguing that symmetrical rates based on TSLRIC should not vary much across companies).

[2569] MFS comments at 82 (emphasis in original); *see also* WinStar comments at 24-26; GST comments at 40-42.

[2570] *See, e.g.,* MCI comments at 50-51; MFS comments at 82-84.

[2571] MCI comments at 49-50.

[2572] *Id.*

[2573] *Id.*

[2574] MFS comments at 83.

[2575] Alabama Commission comments at 32.

[2576] *See, e.g.,* MFS comments at 83-84; WinStar comments at 26.

based on the cost of optimal technology gives all carriers an incentive to use the most efficient network design in order to reduce costs.[2577] Further, GST argues that the long-term efficient cost of transporting and terminating traffic should be identical for all providers, based upon their adoption of the most efficient technology, even if their short-term costs based upon today's technology are different.[2578] WinStar argues that asymmetrical cost-based compensation would penalize new entrants for deploying state-of-the-art technology. According to WinStar, such a system would require new entrants to absorb the costs of the incumbent LECs' less efficient networks by paying higher termination rates, while entrants would be required to pass cost savings from their more efficient networks to the less efficient incumbent LECs by charging lower terminations rates.[2579] WinStar asserts that incumbent LECs have no incentive to increase the efficiency of their own operations as long as they remain free to recover the costs of terminating traffic through higher termination rates than those of their competitors.[2580]

1076. Many state commissions and potential new entrants contend that symmetrical rates should be based on the incumbent LEC's costs. AT&T argues that such an approach provides carriers with the proper incentives to minimize costs and has the added benefit of being administratively manageable, given that incumbent LECs will already be performing TSLRIC studies.[2581] In addition, the Massachusetts Commission notes that entrants may not have the expertise or ability to calculate costs for specific services, and supports use of the incumbent LECs' costs to calculate reciprocal compensation rates. The Alabama Commission asserts, however, that reciprocal compensation rates should be set equal to the transport and termination rates charged by entrants.[2582] Noting that some new entrants may have higher costs than incumbent LECs, several commenters argue that, while reciprocal compensation generally should be symmetrical based on incumbent LECs' costs, new entrants should be able to prove their costs are higher than the incumbent LECs' rates.[2583] Lincoln Telephone, on the other hand, opposes a symmetry requirement because it "achieves expediency at the expense of economic efficiency, thereby eliminating some of the benefits of competition under the Act."[2584]

[2577] MFS comments at 84.

[2578] GST comments at 35-38.

[2579] WinStar comments at 26.

[2580] *Id.*

[2581] AT&T comments at 69; *see also* Texas Public Utility Counsel comments at 52-54.

[2582] Alabama Commission comments at 32.

[2583] *See, e.g.,* Mass. Commission comments at 13; Sprint comments at 83.

[2584] Lincoln Tel. comments at 22.

1077. Several commenters, including many states, contend that this issue should be left to the states or parties to decide.[2585] The California Commission suggests that symmetry should be encouraged by the Commission but not mandated.[2586] NYNEX claims that, although the statute does not require symmetrical rates, parties may agree to such a scheme in a negotiated agreement.[2587]

1078. Certain commenters argue that any symmetry requirement should only apply to separate rate elements. The Ohio Commission supports symmetrical rates on a rate element-by-rate element basis (*e.g.*, local switching rate element, local transport rate element).[2588] For example, the Ohio Commission would not endorse symmetrical rates for transport and termination where a new entrant requests interconnection with an incumbent LEC's tandem office, and the new entrant does not have tandem capabilities.[2589] In that case, terminating a call on the new entrant's network typically would involve only the use of local switching and local transport between the interconnection point and the LEC's switch. In contrast, terminating a call on the incumbent LEC's network often is likely to involve the use of the incumbent LEC's tandem switch in addition to the local switch and the transport between the two switching offices.[2590] Bell Atlantic argues that the reciprocal compensation rate for calls delivered to an access tandem for which the terminating carrier will incur the cost of tandem switching and transport should be allowed to be higher than rates for calls delivered to an end office, which do not incur those additional costs.[2591]

1079. MFS opposes a two-tier termination rate structure under which one rate applies for traffic routed through an incumbent LEC's tandem switch, and a lower rate applies to traffic directly trunked to an incumbent LEC's end office. MFS asserts that these rate structures are inherently non-reciprocal because non-incumbent LECs typically do not operate separate tandem and end-office hierarchies.[2592] Time Warner argues that transport and termination based on incumbent LECs' historical choices of network architecture penalizes new LECs that deploy different architectures, even when that architecture is more

[2585] *See, e.g.,* Ohio Commission comments at 73-75; Illinois Commission comments at 79-80; Pennsylvania Commission comments at 40; Ohio Consumers' Counsel reply at 24.

[2586] California Commission comments at 44.

[2587] NYNEX reply at 43-44.

[2588] Ohio Commission comments at 73-75

[2589] *Id.* at 73-74.

[2590] *Id.*

[2591] Bell Atlantic comments at 43.

[2592] MFS comments at 77-78; *see also* NCTA reply at 14-15.

efficient.[2593] TCI argues that higher charges for routing calls through tandem switches rather than directly through the incumbent LEC's end offices will discourage carriers from routing traffic through tandem switches, even when it is efficient to do so.[2594]

1080. *LEC-CMRS Interconnection NPRM*. Many CMRS providers contend that they are unable to negotiate interconnection arrangements based on mutual or reciprocal compensation because of incumbent LEC bargaining power.[2595] In its reply comments, Omnipoint asserts that many interconnection agreements across the CMRS industry reflect a general incumbent LEC unwillingness to provide reciprocal compensation.[2596] SBC argues, however, that CMRS providers have significant bargaining power and numerous options for interconnection.[2597] Ameritech states that it continues to fulfill the principles of mutual compensation in all of its CMRS compensation arrangements.[2598]

1081. Although the incumbent LECs generally contend that good faith negotiations are working well,[2599] most CMRS providers comment that the negotiation process works poorly.[2600] According to AT&T, the problem of achieving mutual compensation is further compounded because incumbent LECs not only charge rates that bear no relationship to their costs but also refuse to compensate CMRS providers for termination of landline-originated calls.[2601] In many instances, incumbent LECs even charge CMRS providers for terminating incumbent LEC-originated calls.[2602] GTE, however, states that it does not charge

[2593] Time Warner comments at 87-88; *see also* Continental comments at 13-14; Winstar comments at 26.

[2594] TCI comments at 28.

[2595] *See, e.g.,* Nextel comments in CC Docket No. 95-185 at 5; Tracer reply in CC Docket No. 95-185 at 8; Vanguard comments in CC Docket No. 95-185 at 6; *see also* CTIA comments in CC Docket No. 95-185 at 8.

[2596] Omnipoint reply in CC Docket No. 95-185 at 3-7; *see also* RCC comments in CC Docket No. 95-185 at 5; 360 Degrees comments in CC Docket No. 95-185 at 3; Western Wireless comments in CC Docket No. 95-185 at 13.

[2597] SBC comments in CC Docket No. 95-185 at 13.

[2598] Ameritech comments in CC Docket No. 95-185 at 4.

[2599] *See, e.g.*, GTE comments in CC Docket No. 95-185 at 18; Ameritech comments in CC Docket No. 95-185 at 4.

[2600] *See, e.g.,* APC/Sprint Joint comments in CC Docket No. 95-185 at 11; PCIA reply in CC Docket No. 95-185 at 6-8; *see also* Cox comments in CC Docket No. 95-185 at 12-16; AT&T reply in CC Docket No. 95-185 at 4-8.

[2601] AT&T comments in CC Docket No. 95-185 at 8; *see also* Western Wireless comments in CC Docket No. 95-185 at 13; New Par comments in CC Docket No. 95-185 at 5.

[2602] *See, e.g.,* Arch comments in CC Docket No. 95-185 at 3; Centennial comments in CC Docket No. 95-185 at 9; Century comments in CC Docket No. 95-185 at 4; CMT comments in CC Docket No. 95-185 at 4; Nextel comments in CC

CMRS providers for land-to-mobile traffic.[2603] California has rejected the principle of mutual compensation for interconnection, reasoning that such a policy would lead to a calling-party-pays system, which in turn could lead to an increase in the cost of basic telephone service.[2604] CMRS providers report that they receive mutual compensation from only a handful of the incumbent LECs with which they interconnect.[2605]

1082. CMRS providers generally agree that many interconnection arrangements result in unjust, unreasonable and discriminatory interconnection rates, terms and conditions.[2606] According to Cox, the average incremental cost of call termination, expressed on a per minute basis is .20 cents, but the average charge for cellular interconnection is currently 3 cents per minute.[2607] Similarly, Comcast states that the aggregate charge it pays Bell Atlantic for call termination is 2.5 cents per minute, or 12.5 times the average incremental cost of 0.2 cents.[2608] In contrast, the incumbent LECs assert that incumbent LEC interconnection rates have provided for reasonable charges.[2609] A few incumbent LECs also point to the lack of interconnection rate complaints filed in their respective regions as evidence of reasonable rates.[2610] Cox responds that "the fact that few complaints have been filed does not lead to the conclusion that existing agreements are reasonable, let alone that they promote competition."[2611] U S West contends that, until the local rate subsidy issue is addressed, reform in CMRS interconnection charges will not come to fruition.[2612]

Docket No. 95-185 at 5.

[2603] GTE comments in CC Docket No. 95-185 at 19-20.

[2604] California Commission comments in CC Docket No. 95-185 at 6.

[2605] *See, e.g.,* Bell Atlantic/NYNEX Mobile comments in CC Docket No. 95-185 at 4-5.

[2606] *See, e.g.,* Comcast comments in CC Docket No. 95-185 at 4; Vanguard comments in CC Docket No. 95-185 at 7.

[2607] Cox comments in CC Docket No. 95-185 at 13.

[2608] Comcast comments in CC Docket No. 95-185 at 5-6.

[2609] *See, e.g.*, Pacific Bell reply in CC Docket No. 95-185 at 16-27; U S West comments in Docket 95-185 at 6-8.

[2610] *See, e.g.*, Bell Atlantic comments in CC Docket No. 95-185 at 9-11; NYNEX comments in CC Docket No. 95-185 at 13-15, 22-23; Ameritech comments in CC Docket No. 95-185 at 4; USTA comments in CC Docket No. 95-185 at 7.

[2611] Cox reply in CC Docket No. 95-185 at 6; *see also* New Par reply in CC Docket No. 95-185 at 7; PageNet reply CC Docket No. 95-185 at 5-7.

[2612] US West reply in CC Docket No. 95-185 at 5. US West alleges that access and local interconnection must be priced above cost to provide a subsidy to local residential services that remain priced below cost.

1083. The incumbent LECs further assert that, aside from anecdotal commentary, CMRS providers submit no evidence that their market entry or growth has been impeded by state or incumbent LEC action with respect to interconnection.[2613] The incumbent LECs argue that CMRS is developing rapidly under existing compensation arrangements and therefore current interconnection policies apparently do not pose a barrier to CMRS competition.[2614] U S West contends that CMRS providers have benefitted from negotiations that have resulted in declining interconnection charges as well as added flexibility with the introduction of calling-party-pays and wide area calling options.[2615] Many CMRS providers contend, however, that the industry may have grown faster had it not been impeded by unreasonable interconnection rates.[2616] Some incumbent LECs also point out that interconnection charges only represent a small percentage of a CMRS provider's total operating costs.[2617] But according to Airtouch, interconnection charges represent a growing proportion of CMRS costs.[2618]

1084. According to most paging companies, incumbent LEC abuses are especially acute for narrowband CMRS providers.[2619] Because virtually 100 percent of paging calls are originated on incumbent LEC networks and terminated on CMRS networks, incumbent LEC abuses, it is argued, present a formidable barrier to entry in the CMRS marketplace.[2620] Most paging carriers allege that incumbent LECs charge narrowband CMRS providers for terminating LEC-originated calls on the paging network but do not compensate narrowband CMRS providers for terminating incumbent LEC originated traffic.[2621] Many narrowband CMRS providers also allege discrimination because the charges assessed to paging companies for connection to the landline network are different from the charges assessed on other

[2613] *See, e.g.*, NYNEX reply in CC Docket No. 95-185 at 4; Pacific Bell reply in CC Docket No. 95-185 at 13-16.

[2614] *See, e.g.,* USTA reply in CC Docket No. 95-185 at 2-5.

[2615] US West comments in CC Docket No. 95-185 at 7-12.

[2616] *See, e.g.,* Vanguard reply in CC Docket No. 95-185 at 9; PageNet reply in CC Docket No. 95-185 at 7.

[2617] US West CC Docket No. 95-185 comments at 16; USTA reply in CC Docket No. 95-185 at 4-5. SBC estimates that interconnection charges represent 5.5 to 7 percent of a CMRS provider's total operating costs. SBC reply in CC Docket No. 95-185 at 18.

[2618] *See, e.g.,* Airtouch reply in CC Docket No. 95-185 at 10-13.

[2619] *See, e.g.,* Airtouch comments in CC Docket No. 95-185 at 59.

[2620] *See* Celpage comment in CC Docket No. 95-185 at 6.

[2621] *See e.g.,* Arch comments in CC Docket No. 95-185 at 6; Celpage comments in CC Docket No. 95-185 at 6.

CMRS providers, and that many of these interconnection charges are not substantiated with adequate cost data.[2622]

c. Discussion

(1) Symmetry In General

1085. Regardless of whether the incumbent LEC's transport and termination prices are set using a TELRIC-based economic cost study or a default proxy, we conclude that it is reasonable to adopt the incumbent LEC's transport and termination prices as a presumptive proxy for other telecommunications carriers' additional costs of transport and termination. Both the incumbent LEC and the interconnecting carriers usually will be providing service in the same geographic area, so the forward-looking economic costs should be similar in most cases. We also conclude that using the incumbent LEC's forward-looking costs for transport and termination of traffic as a proxy for the costs incurred by interconnecting carriers satisfies the requirement of section 252(d)(2) that costs be determined "on the basis of a reasonable approximation of the additional costs of terminating such calls." Using the incumbent LEC's cost studies as proxies for reciprocal compensation is consistent with section 252(d)(2)(B)(ii), which prohibits "establishing with particularity the additional costs of transporting or terminating calls."[2623] If both parties are incumbent LECs (*e.g.*, an independent LEC and an adjacent BOC), we conclude that the larger LEC's forward-looking costs should be used to establish the symmetrical rate for transport and termination. We conclude that larger LECs are generally in a better position to conduct a forward-looking economic cost study than smaller carriers.

1086. We conclude that imposing symmetrical rates based on the incumbent LEC's additional forward-looking costs will not substantially reduce carriers' incentives to minimize those costs. A symmetric compensation rule gives the competing carriers correct incentives to minimize its own costs of termination because its termination revenues do not vary directly with changes in its own costs. Moreover, symmetrical rates based on the incumbent LEC's costs should not seriously affect incumbent LECs' incentives to control costs. We expect that incumbent LECs will transport and terminate much more traffic that originates on their own networks than traffic that originates on competing carriers' networks. Even if, under the additional cost standard, incumbent LECs were required to reflect any improvements in operating efficiency, and consequent cost reductions, in reduced termination rates, the cost savings realized by the incumbent LEC are likely to be much greater than its reduction in net termination revenues, because the majority of traffic transported and terminated is likely to be its own. Even if a pass-through of incumbent LEC's cost reductions were instantaneous and complete, the number of minutes of use on which an

[2622] *See, e.g.,* Arch comments in CC Docket No. 95-185 at 23-25.

[2623] 47 U.S.C. §252(d)(2)(B)(ii).

incumbent LEC's net termination revenues is assessed is much smaller than its overall number of minutes of switching and transport. Moreover, if a portion of the reduction in costs is specific to exchange traffic, under symmetrical rates, the LEC's revenues from terminating traffic originating from another local carrier are based on the net difference in traffic, which is likely to be much smaller than the total traffic it terminates.[2624] For example, in the case where traffic is balanced, net termination charges are zero, a figure that is unaffected by changes in the incumbent LEC's costs, and the incumbent LEC is provided with correct incentives to minimize termination costs.

1087. We also find that symmetrical rates may reduce an incumbent LEC's ability to use its bargaining strength to negotiate excessively high termination charges that competitors would pay the incumbent LEC and excessively low termination rates that the incumbent LEC would pay interconnecting carriers. As discussed by commenters in the *LEC-CMRS Interconnection* proceeding, LECs have used their unequal bargaining position to impose asymmetrical rates for CMRS providers and, in some instances, have charged CMRS providers origination as well as termination charges.[2625] On the other hand, symmetrical rates largely eliminate such advantages because they require incumbent LECs, as well as competing carriers, to pay the same rate for reciprocal compensation.

1088. Symmetrical compensation rates are also administratively easier to derive and manage than asymmetrical rates based on the costs of each of the respective carriers. In addition, we believe that using the incumbent LEC's cost studies to establish the presumptive symmetrical rates will establish reasonable opportunities for local competition, including opportunities for small telecommunications companies entering the local exchange market.[2626] We have considered the economic impact of our rules in this section on small incumbent LECs. For example, RTC argues that symmetrical rates do not consider the costs involved in the use of another carrier's network. We find, however, that incumbent LECs' costs, including small incumbent LECs' costs, serve as reasonable proxies for other carriers' costs of transport and termination for the purpose of reciprocal compensation. We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state

[2624] Consider a situation approximating traditional LEC-CMRS interconnection, in which traffic flows are substantially unbalanced: let us suppose, of 1,000,000 minutes of use, 750,000 are CMRS-to-LEC and 250,000 LEC-to-CMRS. Thus, under symmetric compensation at 0.3 cents per minute, the LEC receives 0.3 cents times 500,000, or $1,500.00. If it reduced its per-minute cost, for some reason only on terminating CMRS-to-LEC traffic, to 0.2 cents per minute, it would save 0.1 cent times 750,000, or $750.00, in reduced costs, whereas its terminating revenues would fall by only 0.1 cent times 500,000, or $500.00. Thus, it would still have substantial incentive to make the cost reduction in question. In situations closer to traffic balance, the incentive is even more favorable. And, of course, the LEC probably also reduces its cost of switching on many millions of other minutes that do not involve other networks at the same time.

[2625] *See, e.g.,* Century Comments in CC Docket No. 95-184 at 4; Western Wireless Comments in CC Docket No. 95-185 at 14.

[2626] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act. In addition, symmetry will avoid the need for small businesses to conduct forward-looking economic cost studies in order for the states to arbitrate reciprocal compensation disputes.[2627]

1089. Given the advantages of symmetrical rates, we direct states to establish presumptive symmetrical rates based on the incumbent LEC's costs for transport and termination of traffic when arbitrating disputes under section 252(d)(2) and in reviewing BOC statements of generally available terms and conditions. If a competing local service provider believes that its cost will be greater than that of the incumbent LEC for transport and termination, then it must submit a forward-looking economic cost study to rebut this presumptive symmetrical rate. In that case, we direct state commissions, when arbitrating interconnection arrangements, to depart from symmetrical rates only if they find that the costs of efficiently configured and operated systems are not symmetrical and justify a different compensation rate. In doing so, however, state commissions must give full and fair effect to the economic costing methodology we set forth in this order, and create a factual record, including the cost study, sufficient for purposes of review after notice and opportunity for the affected parties to participate. In the absence of such a cost study justifying a departure from the presumption of symmetrical compensation, reciprocal compensation for the transport and termination of traffic shall be based on the incumbent local exchange carrier's cost studies.

1090. We find that the "additional costs" incurred by a LEC when transporting and terminating a call that originated on a competing carrier's network are likely to vary depending on whether tandem switching is involved. We, therefore, conclude that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch. In such event, states shall also consider whether new technologies (*e.g.*, fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate.

1091. We disagree with TCI's claim that higher charges for routing calls through tandem switches rather than directly through incumbent LECs' end offices will materially discourage carriers from routing traffic through tandem switches, even when it is efficient to do so. New entrants will only be encouraged to interconnect at end-office switches, rather than tandem switches, when the decrease in incumbent LEC transport charges justifies the extra costs incurred by the new entrant to route traffic directly through the incumbent LEC's end-office switches. Carriers will interconnect in a way that minimizes their costs of

[2627] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

interconnection, including the use of cost-based LEC network elements. In addition, the flexibility given to states may allow carriers, including small entities, with different network architectures to establish rates for terminating calls originating on other carriers' networks that are asymmetrical, if they can show that the costs of efficiently configured and operated systems are not symmetrical and justify different compensation rates, instead of being based on competitors' network architectures.[2628]

1092. We believe, with respect to interconnection between LECs and paging providers, that there should be an exception to our rule that states must establish presumptive symmetrical rates based on the incumbent LEC's costs for transport and termination of traffic. While paging providers, as telecommunications carriers, are entitled to mutual compensation for the transport and termination of local traffic, and should not be required to pay charges for traffic that originates on other carriers' networks, we believe that incumbent LECs' forward-looking costs may not be reasonable proxies for the costs of paging providers. Paging is typically a significantly different service than wireline or wireless voice service and uses different types and amounts of equipment and facilities. PageNet's own network, for example, is based on regional hub and spoke network that transmit paging calls from radio transmitters provide regional or national coverage.[2629] This configuration is distinctly different from either LEC wireline networks, with their hierarchy of switches and transmission facilities, or cellular carriers, with their multiple cells and sophisticated systems for handing off calls as a vehicle moves across cell boundaries. In addition, most calls terminated by paging companies are brief (averaging 15 seconds) in duration and contain no voice message, but only an alpha-numeric message of a few characters.[2630] Using incumbent LEC's costs for termination of traffic as a proxy for paging providers' costs, when the LECs' costs are likely higher than paging providers' cost, might create uneconomic incentives for paging providers to generate traffic simply in order to receive termination compensation. Thus, using LEC costs for termination of voice calls thus may not be a reasonable proxy for paging costs as the types of switching and transport that paging carriers perform are different from those of LECs and other voice carriers.

1093. Given the lack of information in the record concerning paging providers' costs to terminate local traffic, we have decided to initiate a further proceeding to try to determine what an appropriate proxy for paging costs would be and, if necessary, to set a specific paging default proxy. In the interim, however, in the event that LECs and paging companies cannot negotiate agreed-upon rates, we direct states, when arbitrating disputes under section 252(d)(2), to establish rates for the termination of traffic by paging providers based on the forward-looking economic costs of such termination to the paging provider. The paging provider seeking termination fees must prove to the state commission the costs of terminating local

[2628] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

[2629] PageNet comments at 34.

[2630] Letter from Carl W. Northrop, Paul, Hastings, Janofsy & Walker, on behalf of Arch Communications to Michele Farquhar, Chief, WTB, July 11, 1996.

calls. Given the lack of information in the record concerning paging providers' costs, we further conclude that the default price for termination of traffic from the end office that we adopt in this proceeding in Section XI.B.3., *supra*, does not apply to termination of traffic by paging providers. This default price is based on estimates in the record of the costs to LECs of termination from the end office or end-office switching. There are no such estimates with respect to paging in the record, and as discussed above, we find that estimates of LEC costs may not reflect paging providers' costs.

(2) Existing Non-Reciprocal Agreements Between Incumbent LECs and CMRS Providers

1094. Section 20.11 of our rules, which predates enactment of the 1996 Act, requires that interconnection agreements between incumbent LECs and CMRS providers comply with principles of mutual compensation, and that each carrier pay reasonable compensation for transport and termination of the other carrier's calls.[2631] Based on the extensive record in the *LEC-CMRS Interconnection* proceeding, as well as that in this proceeding, we conclude that, in many cases, incumbent LECs appear to have imposed arrangements that provide little or no compensation for calls terminated on wireless networks, and in some cases imposed charges for traffic originated on CMRS providers' networks, both in violation of section 20.11 of our rules.[2632] Accordingly, we conclude that CMRS providers that are party to pre-existing agreements with incumbent LECs that provide for non-mutual compensation have the option to renegotiate these agreements with no termination liabilities or other contract penalties. Pending the successful completion of negotiations or arbitration, symmetrical reciprocal compensation provisions shall apply, with the transport and termination rate that the incumbent LEC charges the CMRS provider from the pre-existing agreement applying to both carriers, as of the effective date of the rules we adopt pursuant to this order.

1095. In addition, we conclude that this opportunity for CMRS providers currently operating under arrangements with non-mutual transport and termination rates to renegotiate such arrangements

[2631] 47 C.F.R. § 20.11.

[2632] *See, e.g.,* Centennial comments in Docket 95-185 at 8-9 (states that it does not receive compensation for terminating LEC-originated traffic in any of its 28 cellular markets, and is charged by the LEC to terminate LEC-originated calls in many of those markets); Century Cellunet comments in Docket 95-185 (states that it does not receive compensation from LECs to terminate landline originating calls, and that in some states, it must pay the LEC to terminate landline originating calls; further states that it is charged an average rate of $0.025 per minute for local interconnection); Point Communications comments in Docket 95-185 at 1 (Point has never received compensation for terminating landline originated calls); and Vanguard Cellular comments in Docket 95-185 at 7--8; 11 (notes that of the 95 LECs with which it interconnects, only one LEC in one community pays compensation for termination of LEC-originated calls).

advances the mutual compensation regime contemplated under section 251(b)(5) of the 1996 Act.[2633] We find that extending the opportunity to establish symmetrical reciprocal compensation for the transport and termination of traffic addresses inequalities in bargaining power that incumbent LECs may used to disadvantage interconnecting wireless carriers. At the same time, our rule will place wireless carriers with non-mutual, existing agreements on the same footing as other new entrants, who will be able to negotiate more equitable interconnection agreements because of the rules we put in place with this Report and Order. We find that we have ample authority under section 4(i) of the 1934 Act as well as section 251 of the 1996 Act, to order this remedy. Courts have held that "the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful . . . and to modify other provisions of private contracts when necessary to serve the public interest."[2634] The opportunity that we are affording to CMRS providers in this context is consistent with similar "fresh look" requirements that we have adopted in the past.[2635]

5. Bill and Keep

a. Background

1096. *Local Competition NPRM*. In the NPRM, we defined bill-and-keep arrangements as those in which neither of two interconnecting networks charges the other network for terminating traffic that originated on the other network.[2636] Instead, each network recovers from its own end users the cost of both originating traffic delivered to the other network and terminating traffic received from the other network. A bill-and-keep approach for termination of traffic does not, however, preclude a positive flat-rated charge for transport of traffic between carriers' networks.

[2633] We use the term "reciprocal compensation" and "mutual compensation" synonymously to mean that compensation flows in both directions between interconnecting networks. *See LEC-CMRS Interconnection NPRM* at para. 27 n.31.

[2634] *Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987). The Commission has adopted similar "fresh look" requirements in the past.

[2635] *See, e.g., Expanded Interconnection with Local Telephone Company Facilities*, CC Docket Nos. 91-141 and 92-222, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, 7463-7465 (1992), *recon.*, 8 FCC Rcd 7341, 7342-7359 (1993) (fresh look to enable customers to take advantage of new competitive opportunities under special access expanded interconnection), *vacated on other grounds and remanded for further proceedings sub nom. Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (1994); *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 2677, 2681-82 (1992) ("fresh look" in context of 800 bundling with interexchange offerings); *Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 MHz Bands*, GEN Docket No. 88-96, Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd 4582, 4583-84 (1991) ("fresh look" requirements imposed in context of air-ground radiotelephone service as condition of grant of Title III license).

[2636] NPRM at para. 239.

1097. We sought comment on what guidance we should give state commissions regarding the use of bill-and-keep arrangements in arbitrated interconnection arrangements.[2637] We sought comment on whether section 252(d)(2)(B)(ii) specifically authorizes states to impose bill-and-keep arrangements in the arbitration process, at least when certain conditions are met.[2638] We also sought comment on whether we should interpret the statute as placing any limits on the circumstances in which states may adopt bill-and-keep arrangements.[2639] We also asked for comment on the meaning of the statutory description of bill-and-keep arrangements as "arrangements that waive mutual recovery."[2640] In addition, we sought comment on whether there are any circumstances in which the statute requires states to establish bill-and-keep arrangements.[2641]

1098. *LEC-CMRS Interconnection NPRM*. In the *LEC-CMRS Interconnection NPRM*, we proposed bill and keep as an interim arrangement.[2642] We noted there that proponents have argued that bill-and-keep would be economically efficient if either of two conditions are met: (1) traffic flows between competing LECs are balanced; or (2) the per-unit cost of interconnection is *de minimis*. We, therefore, address whether interim bill-and-keep arrangements for LEC-CMRS traffic should be imposed.

b. Comments

1099. *Local Competition NPRM*. Numerous new entrants and state commissions contend that bill-and-keep arrangements are expressly authorized by the statute.[2643] Non-incumbent LECs argue that section 252(d)(2) makes clear that bill-and-keep satisfies the reciprocal compensation duties of section 251(b)(5). Therefore, pursuant to the Commission's broad authority to adopt implementing regulations via section 251(d)(1), and consistent with the interconnection pricing standards, they argue that the Commission has the authority to require a bill-and-keep reciprocal compensation mechanism.[2644]

[2637] NPRM at para. 243.

[2638] *Id.*

[2639] *Id.*

[2640] *Id.* (*citing* 47 U.S.C. § 252(d)(2)(B)(i)).

[2641] *Id.*

[2642] *See LEC-CMRS Interconnection NPRM* at paras. 60-62.

[2643] *See, e.g.*, Continental comments at 11; GST comments at 34-35; California Commission comments at 45-46; Time Warner comments at 93, reply at 34-37; Omnipoint comments at 15; Hyperion comments at 20-21; WinStar reply at 12.

[2644] *See, e.g.*, Time Warner comments at 93-94; ACSI comments at 21-26. *But see* Ohio Consumers' Counsel reply at 24 (contending that Time Warner's argument is circular).

Continental and NCTA assert, contrary to some incumbent LEC arguments, that section 252(b)(2)(B)(i) does not limit bill-and-keep to situations in which incumbent LECs waive their right to some other form of compensation, but instead clarifies that regulators are not precluded from imposing or approving such waivers.[2645] Numerous state commissions contend that reciprocal compensation issues should be left to the states to decide, and that states have the authority to impose bill-and-keep arrangements.[2646] Many of these commenters further argue that, while states have the authority to require bill-and-keep arrangements, the Commission does not have the authority to mandate these arrangements.[2647]

1100. Incumbent LECs as well as certain other commenters contend that mandatory bill-and-keep requirements conflict with the 1996 Act.[2648] Numerous incumbent LECs also argue that bill-and-keep arrangements fail the "reasonable approximation of the additional costs" test of section 252(d)(2) because they would effectively price termination at zero.[2649] For example, RTC argues that bill and keep fails to adequately deal with each carrier's costs and should not be considered, even as an interim proposal.[2650] Cincinnati Bell contends that the statute merely authorizes bill-and-keep arrangements in voluntary negotiations and only parties to the negotiation can properly assess if such an arrangement would be appropriate.[2651] In response to Cincinnati Bell's argument, potential new entrants counter that the only reasonable interpretation of section 252(d)(2) is that regulators may impose bill and keep over the objection of an incumbent LEC.[2652] They assert that this is the only logical interpretation because section 252(d)(2) only applies to arbitration cases. If parties reach an agreement to use bill-and-keep arrangements, this section would not apply.[2653]

[2645] Continental comments at 11 n.15; NCTA comments at 55; *cf.* Cox reply at 19.

[2646] *See, e.g.,* Louisiana Commission comments at 20; Illinois Commission comments at 80; District of Columbia Commission comments at 37-38; Florida Commission comments at 40; *see also* Ohio Consumers' Counsel reply at 24.

[2647] *See, e.g.,* Illinois Commission comments at 80; District of Columbia Commission comments at 38.

[2648] *See, e.g.,* Ameritech comments at 78-79; PacTel comments at 95; SBC comments at 51-52; GTE comments at 56-58; BellSouth comments at 73-74; Cincinnati Bell comments at 38-39; Frontier comments at 32; Washington Independent Tel. Ass'n comments at 4; TDS comments at 24; ALTS comments at 45.

[2649] *See, e.g.,* NYNEX comments at 88-90; Ameritech Comments at 78-79; Bell Atlantic comments at 41-42; PacTel comments at 95; USTA comments at 82-84; U S West comments at 70-71.

[2650] RTC comments at 23.

[2651] Cincinnati Bell comments at 38-39.

[2652] *See, e.g.,* Jones Intercable comments at 27; NCTA reply at 15; ALTS reply at 31 n.37; Comcast reply at 12-14.

[2653] *Id.*

1101. Proponents of bill-and-keep arrangements contend that these arrangements minimize the administrative costs associated with metering and billing that would be incurred under other compensation methods.[2654] In addition, because there currently may be no mechanism readily available to new entrants for measuring terminating traffic, states and new entrants argue that the cost of measurement and billing under a reciprocal compensation agreement is not known.[2655] TCG asserts that bill-and-keep arrangements would reduce small carriers burdens by eliminating billing and monitoring requirements and the potential for carrier disputes.[2656] MCI asserts that termination measurement and billing costs would represent a substantial portion of termination costs.[2657] It notes that in the state of Washington, US West estimated that measurement and billing costs would more than double its reported TSLRIC cost of switching for local terminations.[2658] Other benefits of a bill-and-keep arrangement presented by commenters include: (1) elimination of incentives to "game" the LEC-to-LEC relationship by soliciting (or avoiding) customers with high incoming or outgoing usage;[2659] (2) architectural and technological neutrality;[2660] (3) the reduction of economic barriers to entry because it does not require additional capital investment that other arrangements would necessitate;[2661] and (4) economic efficiency.[2662] USTA, however, asserts that alternative local service providers will have no economic incentives to use the lower cost facilities or service under bill-and-keep arrangements.[2663]

[2654] *See, e.g.,* California commission at 45; DOJ comments at 34-35; Teleport comments at 77; Jones Intercable comments at 28-29; Mass. Attorney General comments at 19. *But see* Bell Atlantic reply at Exhibit 2, p.8 (Richard Epstein, a witness for Bell Atlantic, argues that bill-and-keep may lead to habitual overconsumption by the party terminating less traffic that will be significantly more costly than administrative cost savings).

[2655] *See, e.g.,* Colorado Commission comments at 59; AT&T comments at 69; Sprint comments at 86-87; ACSI comments at 22-23.

[2656] TCG comments at 80.

[2657] MCI comments at 48.

[2658] *Id.; see also* Teleport comments at 77.

[2659] *See, e.g.,* Jones Intercable comments at 27-28; GST comments at 34-35; MCI comments at 53.

[2660] *See* Mass. Attorney General comments at 19.

[2661] *See, e.g.,* Telecommunications Resellers Ass'n comments at 54.

[2662] *See, e.g.,* Jones Intercable comments at 28; ACSI comments at 21-26; Competitive Policy Institute reply at 15-17.

[2663] USTA comments at Attachment (Affidavit of Jerry A. Hausman), p. 9-10; *see also* BellSouth comments at Attachment (Interconnection and Economic Efficiency), p. 8-10; Bell Atlantic reply at Attachment (Declaration of Richard A. Epstein) p. 8 (adopting bill and keep would invite new entrants, that are able to tailor their networks, to keep traffic perpetually out of balance, as, for example, by actively courting companies, such as telephone solicitors, that generate a huge volume of outgoing calls).

1102. Potential new entrants observe that bill-and-keep arrangements have traditionally been used by neighboring incumbent LECs for exchanging traffic. Thus, they argue, bill-and-keep arrangements represent a fair mechanism for the exchange of traffic between new entrants and incumbent LECs.[2664] In response to this argument, MECA counters that compensation arrangements should not be patterned after EAS interconnections between incumbent LECs because those EAS arrangements were not designed for the competitive environment.[2665]

1103. Numerous commenters address the issue of the likely balance of traffic between a new entrant and an incumbent LEC. New entrants argue that in most cases traffic between incumbent LECs and competing LECs will be relatively balanced over time[2666] and that additional costs to terminate traffic on already over-built incumbent LEC networks are close to zero.[2667] In addition, the Consumer Federation of America contends that once barriers to competition (*e.g.*, number portability) are removed there is no reason to believe that there will be substantial incentives to seek heavy outgoing-only customers.[2668] While acknowledging that bill-and-keep arrangements may be problematic if traffic levels exchanged are significantly different, other new entrants argue that critics have failed to produce any evidence of materially uneven traffic loadings.[2669] MECA, however, argues that a bill-and-keep reciprocal compensation mechanism is flawed because it is premised on the assumption that terminating traffic will be equal in both directions for competing LECs.[2670] MECA argues that this assumption is incorrect because new entrants will engage in niche marketing to get a toehold in a new service area, and therefore the size of each carrier's customer base will be different and the total number of originating minutes will differ.[2671]

[2664] *See, e.g.,* Sprint/APC comments at 11-12; TCI comments at 27; Continental comments at 10.

[2665] MECA comments at 69.

[2666] Time Warner comments at 97-98; *see also* TCI comments at 35-37.

[2667] Time Warner comments at 98-99; *see also* Teleport comments at 81-83.

[2668] CFA/CU comments at 55.

[2669] *See, e.g.,* ACSI comments at 24; GST comments at 34-35.

[2670] MECA comments at 68-69.

[2671] MECA comments at 68-69; *but see* GST comments at 34-35 (using compensation systems other than bill-and-keep would encourage new entrants to focus entry strategies on niches that exploit compensation levels).

1104. Numerous new entrants and state commissions recommend that bill-and-keep arrangements be implemented on an interim basis[2672] and note that reciprocal compensation arrangements will not be practical until mechanisms are developed to measure the relevant traffic volumes.[2673] Ameritech, however, argues that parties advocating mandating bill-and-keep arrangements on an interim basis do not take into account that the period during which the new carriers first enter a local market will be the time during which traffic is most unbalanced between the new entrants and the incumbent LEC.[2674] BellSouth argues that characterizing bill and keep as an interim arrangement does not remedy the problems associated with bill and keep.[2675]

1105. Some commenters opposed to bill-and-keep arrangements also argue that mandating these arrangements violates the takings clause of the Fifth Amendment.[2676] Numerous incumbent LECs argue that mandating bill-and-keep arrangements requires a LEC to transport and terminate traffic of another LEC, constituting a physical intrusion into the LEC's property.[2677] BellSouth further asserts that bill and keep would lead to no compensation for use of incumbent LEC property and will therefore constitute an uncompensated taking in violation of the Constitution.[2678] AT&T responds that there is no basis for the argument that bill and keep would be a taking.[2679] AT&T asserts that these claims are speculative and rest on an erroneous premise that bill-and-keep would provide no (or inadequate) compensation.[2680] AT&T argues that, as Congress recognizes, bill and keep allows each carrier in-kind compensation in the form of access to the other carrier's network.[2681] Similarly, Ohio Consumers' Counsel argues that a bill-and-keep mechanism makes each company whole through its own rate design and structure. As such, Ohio

[2672] *See, e.g.,* Alabama Commission comments at 32; GST comments at 34-35; AT&T comment at 69; Cox comments at 27-28, 38-39; Sprint comments at 87; Jones Intercable comments at 28-29; Mass. Attorney General comments at 14, 21; Telecommunication Resellers Ass'n comments at 54-55.

[2673] *See, e.g.,* AT&T comments at 69; Colorado Commission at 59.

[2674] Ameritech reply at 36.

[2675] BellSouth reply at 40.

[2676] *See, e.g.,* Bell Atlantic comments at 41-42; Cincinnati Bell comments at 39 n.71; USTA comments at 84; U S West comments at 70-71; GTE comments at 57-58; BellSouth comments at 74-75.

[2677] *See, e.g.,* BellSouth comments at 74-75; Bell Atlantic comments at 41.

[2678] BellSouth comments at 74-75.

[2679] AT&T reply at 36; *see also* ALTS reply at 31; Cox reply at 21-22; Comcast reply at 14; Teleport reply at 20-22.

[2680] *Id.*

[2681] AT&T reply at 36;*see also* Washington Commission comments at 3, 38; Teleport comments at 68.

Consumers' Counsel argues that allegations that bill and keep means that a competing carrier gets to use the incumbent LEC's network for free cannot withstand scrutiny.[2682] NCTA asserts that bill and keep is not "physical occupation" of the incumbent LEC property, and furthermore does not authorize an invasion of incumbent LEC property, any more than it authorizes incumbent LECs to invade a new entrant's property.[2683] In response to the confiscation argument, NCTA contends that rate regulation does not violate the takings clause unless it is so "unjust as to destroy the value of the property for all purposes for which it was acquired."[2684]

1106. Some wireless commenters argue that bill-and-keep arrangements are not appropriate for incumbent LEC-narrowband CMRS or incumbent LEC-paging reciprocal compensation.[2685] ProNet argues that, because paging carriers' incremental termination costs are above zero and there is no evidence that paging demand is inelastic, imposing bill and keep would likely result in serious resource misallocation.[2686] In addition, PageNet argues that, with respect to paging, the cost of termination is not small and in fact comprises a significant portion of the total revenue requirement for paging services.[2687] With respect to rural incumbent LECs, Bay Spring argues that states should be prohibited from adopting bill-and-keep arrangements to the extent that they force rural incumbent LECs to terminate other carriers' calls on their rural networks without compensation.[2688]

1107. *LEC-CMRS Interconnection NPRM*. CMRS providers, with the exception of paging providers, generally support the Commission's proposal to adopt an interim bill-and-keep compensation mechanism.[2689] Some supporters of an interim bill-and-keep compensation model argue that it should be

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[2682] Ohio Consumers' Counsel comments at 44.

[2683] NCTA reply at 16; *see also* Cox reply at 21-22.

[2684] *Id.* at 17 (*citing Duquesne Light Co. v. Barasch*, 109 S.Ct. 609, 615 (1989), and *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 579 (1896)).

[2685] *See, e.g.,* ProNet comments at 11; PageNet comments at 11.

[2686] ProNet comment at 11-12.

[2687] PageNet comments at 11.

[2688] Bay Springs, et. al comments at 17; *see also* GVNW comments at 41; Bay Springs et. al reply at 11-12 (Incremental termination costs for small LECs because the smaller size of their networks reduce economies of scale).

[2689] *See, e.g.*, AirTouch comments in CC Docket No. 95-185 at 20; CTIA comments in CC Docket No. 95-185 at 7; Comcast comments in CC Docket No. 95-185 at 9.

adopted on a permanent basis,[2690] and others argue that it should be extended to transport charges.[2691] PageNet and other paging providers oppose application of a bill-and-keep compensation mechanism to the paging industry because traffic flows are entirely one-way.[2692] Sprint supports application of an interim bill-and-keep model solely for incumbent LEC-PCS interconnection.[2693]

1108. Most CMRS providers contend that bill and keep is an appropriate interim compensation mechanism because the incremental cost of incumbent LEC-CMRS interconnection is so low that there is little difference between a cost-based and zero rate.[2694] Cox and other commenters cite the Brock study's conclusions that the national average incremental cost of incumbent LEC-CMRS interconnection is 0.2 cents per minute and that the off-peak cost is close to zero as support for adoption of an interim bill-and-keep model.[2695] Cox contends that none of the incumbent LECs has submitted evidence that the average incremental cost of call termination is anything other than 0.2 cents per minute.[2696] In addition, APC notes that it has relatively balanced traffic flows with incumbent LECs[2697] and a number of CMRS providers assert that incumbent LEC-cellular traffic flows will become more balanced in the future.[2698] AT&T states that any traffic imbalances are offset by the higher cost to CMRS providers of terminating incumbent LEC-originated calls.[2699] Similarly, CTIA asserts that the relevant inquiry is whether the costs each carrier incurs to terminate traffic are balanced, not whether total traffic is balanced.[2700] Some commenters argue that bill

[2690] *See, e.g.*, New Par comments in CC Docket No. 95-185 at 10; NC 4 Cellular comments in CC Docket No. 95-185 at 1.

[2691] *See, e.g.*, MCI comments in CC Docket No. 95-185 at 5; Nextel comments in CC Docket No. 95-185 at 9; Omnipoint comments in Docket No. 95-185 at 8.

[2692] PageNet comments in CC Docket No. 95-185 at 23; *see also, e.g.,* Allied comments in CC Docket No. 95-185 at 8; Arch comments in CC Docket No. 95-185 at 11.

[2693] Sprint comments in CC Docket No. 95-185 at 7.

[2694] *See, e.g.*, Cox comments in CC Docket No. 95-185 at 29-30.

[2695] Cox comments in CC Docket No. 95-185 at 23; *see also* New Par comments in CC Docket No. 95-185 at 12.

[2696] Cox reply in CC Docket No. 95-185 at 41-42; *see also* Comcast reply in CC Docket No. 95-185 at 17-22.

[2697] APC comments in CC Docket No. 95-185 at 9.

[2698] *See, e.g.*, PCIA comments in CC Docket No. 95-185 at 8; Time Warner comments in CC Docket No. 95-185 at 21.

[2699] AT&T comments in CC Docket No. 95-185 at 10.

[2700] CTIA reply in CC Docket No. 95-185 at 12-14.

and keep is necessary to curb incumbent LEC market power and to remedy incumbent LECs' failure to provide mutual compensation.[2701]

1109. Incumbent LEC commenters, however, generally oppose the Commission's proposal to adopt an interim bill-and-keep compensation mechanism.[2702] A number of incumbent LECs contend that neither of the two conditions that justify a bill-and-keep compensation mechanism -- balanced traffic flows or interconnection costs near zero -- are present in the context of incumbent LEC-CMRS interconnection.[2703] SBC states that bill-and-keep is inappropriate where 80 percent of traffic is CMRS-to-incumbent LEC.[2704] USTA asserts that CMRS interconnection causes incumbent LECs to incur costs for which they should be compensated, and estimates that those costs are 1.3 cents ($0.013) per minute.[2705] Other incumbent LECs contend that the Brock study underestimates the costs of incumbent LEC-CMRS interconnection, but provide no cost estimates of their own.[2706] In addition, many opponents of bill-and-keep contend that it will create market distortions and encourage arbitrage.[2707] Some incumbent LEC commenters assert that incumbent LECs will be unable to recover from ratepayers the lost revenues from LEC-CMRS interconnection charges,[2708] and that bill and keep is an unlawful taking.[2709] U S West disputes the Commission's contention that bill-and-keep is administratively efficient because, it argues, carriers will still have to develop billing and accounting systems.[2710]

[2701] *See, e.g.*, CTIA comments in CC Docket No. 95-185 at 9; Telecommunications Resellers Ass'n comments in CC Docket No. 95-185 at 8.

[2702] *See, e.g.*, Bell Atlantic comments in CC Docket No. 95-185 at 6; BellSouth comments in CC Docket No. 95-185 at 20; NTCA comments in CC Docket No. 95-185 at 8*But see* Teleport comments in CC Docket No. 95-185 at 2.

[2703] *See, e.g.*, Ameritech comments in CC Docket No. 95-185 at 8-9, Cincinnati Bell comments in CC Docket No. 95-185 at 4-5.

[2704] SBC comments in CC Docket No. 95-185 at 12.

[2705] USTA comments in CC Docket No. 95-185 at 24, Attachment (Bill and Keep: A Bad Solution to a Non-Problem), p. 8.

[2706] *See, e.g.*, BellSouth comments in CC Docket No. 95-185 at 24.

[2707] *See, e.g.*, Pacific Bell comments in CC Docket No. 95-185 at 11, 60.

[2708] *See, e.g.*, BellSouth comments in CC Docket No. 95-185 at 28; NYNEX comments in CC Docket No. 95-185 at 34; U S West comments in CC Docket No. 95-185 at 25.

[2709] *See, e.g.*, Bell Atlantic comments in CC Docket No. 95-185 at 8; BellSouth comments in CC Docket No. 95-185 at 20; Pacific Bell comments in CC Docket No. 95-185 at 79; U S West comments in CC Docket No. 95-185 at 49.

[2710] U S West comments in CC Docket No. 95-185 at 39-40.

1110. Several commenters propose alternatives to the Commission's proposed bill-and-keep interim compensation mechanism. For example, Frontier suggests that the Commission adopt a benchmark compensation scheme similar to that offered by Ameritech in Illinois, which sets a rate of .5 cents ($0.005) per minute for end office termination and .75 cents ($0.0075) per minute for tandem termination.[2711] CMS recommends that bill and keep apply for a two year voluntary period, after which a mandatory negotiation period under bill and keep would be imposed if the parties fail to reach agreement.[2712] RCC proposes that bill and keep be used only until a "carrier access billing system" can be implemented.[2713]

c. Discussion

1111. As an additional option for reciprocal compensation arrangements for termination services, we conclude that state commissions may impose bill-and-keep arrangements if neither carrier has rebutted the presumption of symmetrical rates and if the volume of terminating traffic that originates on one network and terminates on another network is approximately equal to the volume of terminating traffic flowing in the opposite direction, and is expected to remain so, as defined below. We disagree with commenters who contend that the Commission and states do not have the authority to mandate bill-and-keep arrangements under any circumstances. Section 252(d)(2)(B)(i) provides that the definition of what may be considered "just and reasonable" terms and conditions for reciprocal compensation "shall not be construed to preclude arrangements that afford mutual recovery (such as bill-and-keep arrangements)."[2714] We conclude that section 252(d)(2) would be superfluous if bill-and-keep arrangements were limited to negotiated agreements, because none of the standards in section 252(d) apply to voluntarily-negotiated agreements. Therefore, it is clear that bill-and-keep arrangements may be imposed in the context of the arbitration process for termination of traffic, at least in some circumstances.

1112. Section 252(d)(2)(A)(i) provides that to be just and reasonable, reciprocal compensation must "provide for the mutual and reciprocal recovery by each carrier of costs associated with transport and termination."[2715] In general, we find that carriers incur costs in terminating traffic that are not *de minimis*, and consequently, bill-and-keep arrangements that lack any provisions for compensation do not provide for recovery of costs. In addition, as long as the cost of terminating traffic is positive, bill-and-keep arrangements are not economically efficient because they distort carriers' incentives, encouraging them to

[2711] Frontier comments in CC Docket No. 95-185 at 9.

[2712] CMS comments in CC Docket No. 95-185 at 17.

[2713] RCC comments in CC Docket No. 95-185 at 8-9.

[2714] 47 U.S.C. § 252(d)(2)(B)(i).

[2715] 47 U.S.C.§ 252(d)(2)(A)(i).

overuse competing carriers' termination facilities by seeking customers that primarily originate traffic. On the other hand, when states impose symmetrical rates for the termination of traffic,[2716] payments from one carrier to the other can be expected to be offset by payments in the opposite direction when traffic from one network to the other is approximately balanced with the traffic flowing in the opposite direction. In such circumstances, bill-and-keep arrangements may minimize administrative burdens and transaction costs. We find that, in certain circumstances, the advantages of bill-and-keep arrangements outweigh the disadvantages, but no party has convincingly explained why, in such circumstances, parties themselves would not agree to bill-and-keep arrangements. We are mindful, however, that negotiations may fail for a variety of reasons. We conclude, therefore, that states may impose bill-and-keep arrangements if traffic is roughly balanced in the two directions and neither carrier has rebutted the presumption of symmetrical rates.

1113. We further conclude that states may adopt specific thresholds for determining when traffic is roughly balanced. If state commissions impose bill-and-keep arrangements, those arrangements must either include provisions that impose compensation obligations if traffic becomes significantly out of balance or permit any party to request that the state commission impose such compensation obligations based on a showing that the traffic flows are inconsistent with the threshold adopted by the state.[2717] States may, however, also apply a general presumption that traffic between carriers is balanced and is likely to remain so. In that case, a party asserting imbalanced traffic arrangements must prove to the state commission that such imbalance exists. Under such a presumption, bill-and-keep arrangements would be justified unless a carrier seeking to rebut this presumption satisfies its burden of proof. We also find that states that have adopted bill-and-keep arrangements prior to the date that this order becomes effective, either in arbitration or rulemaking proceedings, may retain such arrangements, unless a party proves to the state commission that traffic is not roughly balanced. In that case, the state commission is to determine the transport and termination rates based either on the forward-looking economic cost-based methodology or consistent with the default proxies in this order. Finally, we observe that carriers have an incentive to agree to bill-and-keep arrangements if it is economically efficient to do so, and that nothing in the Act prevents parties from agreeing to bill-and-keep arrangements even if a state declines to mandate such arrangements. For example, we note that Time Warner/BellSouth interconnection agreement provides for a bill-and-keep arrangement based on a "roughly balanced traffic" concept.[2718]

[2716] *See infra,* Section XI.A.4. for a discussion of symmetrical rates.

[2717] For example, the Michigan Commission adopted a five percent threshold for the difference between the traffic flows in the two directions. Michigan Commission comments at Attachment 1 (Michigan Public Service Commission Case No. U-10647), p.29.

[2718] Letter from W.W. Jordan, Executive Director, BellSouth, to William F. Caton, Acting Secretary, FCC, July 11, 1996. Per the agreement, no party shall owe compensation to the other unless the net minutes of use for terminating local traffic results in a dollar amount in excess of the amount designated for each month during the calculation period as follows: (1)

1114. In determining whether traffic is balanced, we find that precise traffic measurement is not necessary. It is sufficient to use approximations based on samples and studies comparable to reports on percentages of interstate use often used for access charge billing. Such an approach is likely to reduce implementation costs and complexities. Alternatively, state commissions may require that traffic flowing in the two directions be measured as accurately as possible during some defined period of time, which may commence no later than six months after an interconnection arrangement goes into effect. All affected carriers are required to cooperate with the state commission in implementing this measurement. A state commission that adopts a traffic flow measurement approach may adopt a "true-up" mechanism to ensure that no carrier is disadvantaged by an interim rate that differs from the rate established once such a measurement is undertaken. Finally, state commissions may require that local traffic and access traffic be carried on separate trunk groups if they deem such measures to be necessary to ensure accurate measurement and billing.

1115. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, RTC argues that bill-and-keep arrangements fail to adequately deal with each carrier's costs.[2719] In addition to basing reciprocal compensation on the incumbent LECs costs, we believe that by allowing carriers to rebut a presumption of balanced traffic volumes, the concern that bill-and-keep arrangements fail to adequately deal with each carrier's costs are addressed. We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act.

1116. We disagree with commenters that argue that mandating bill-and-keep arrangements in these circumstances violates the taking clause of Fifth Amendment. We reject BellSouth's argument that mandating bill-and-keep mechanisms would constitute a physical intrusion of LEC property. As NCTA observes, bill-and-keep arrangements are not a "physical occupation" of incumbent LEC property and thus *per se* takings cases[2720] are irrelevant. We also reject arguments that the bill-and-keep arrangements we adopt here would not adequately compensate incumbent LECs for transport and termination. As Congress recognized, bill-and-keep arrangements allow each carrier compensation "in-kind" in the form of access to

during the first six month period of operation, no charges shall accrue, or compensation paid for the termination of local traffic, however, parties shall exchange billing information and usage data during this initial period for the purpose of reviewing for accuracy only; (2) during the second six months, $40,000 per month/billing period; (3) during the third six months, $30,000 per month/billing period; (4) during the fourth six months, $20,000 per month/billing period; and (5) during any extension of this agreement pursuant to Article II, paragraph 2.03, $0 per month/billing period.

[2719] RTC comments at 23.

[2720] *See Loretto v. Telepromter Manhattan CATV Corp.* 458 U.S. 419, 426 (1982); *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2893 (1992).

the other carrier's network.[2721] Therefore, the type of bill-and-keep arrangements that we have permitted states to adopt are not unconstitutionally confiscatory.

1117. Commenters in the *LEC-CMRS Interconnection NPRM* assert that the estimated per minute cost of LEC termination ranges from 0.2 to 1.3 cents, and most of the estimates are clustered near the lower end of this range.[2722] These estimates are based primarily on interconnection at a LEC end office,[2723] while most interconnections occur at tandem offices where LECs' costs of call completion are higher than terminations routed directly through the end office switch.[2724] Moreover, the record contains no estimates of the cost of CMRS termination. That cost is generally considered to be greater than the cost of LEC termination;[2725] but only one oral, *ex parte* estimate of CMRS cost has been offered: 2.25 to 4.0 cents per minute.[2726] Further, there is no showing that the transaction costs of measuring traffic flows and making net payments would be so high that a bill-and-keep regime would be more efficient. Moreover, no party has demonstrated that aggregate cost flows between interconnecting LECs and CMRS providers are in balance.

1118. In light of the overall transport and termination policy we are adopting, we do not adopt the interim bill and keep arrangement tentatively proposed in the LEC-CMRS Interconnection NPRM. Notwithstanding our conclusions about bill and keep above, under which states may rule on bill and keep for particular pairs of firms based on the circumstances prevailing between them, we conclude that we are correct in not adopting bill and keep as a single, nationwide policy that would govern all LEC-CMRS transport and termination of traffic. Thus, we reject our tentative conclusion in the LEC-CMRS Interconnection NPRM. We expect, however, that when it is economically efficient to do so, parties will adopt bill and keep arrangements in the negotiation process. Also, as described above, a state commission may impose bill-and-keep arrangements with respect to CMRS-LEC traffic when it finds that traffic is roughly balanced and is expected to remain so.

[2721] Joint Explanatory Statement at 120.

[2722] For the .2 cents per minute estimate, see letter from Robert F. Roche, CTIA, to William F. Caton, Acting Secretary, Federal Communications Commission, filed in CC Docket No. 94-54, Gerald W. Brock, *The Economics of Interconnection: Incremental Cost of Local Usage* (April 1995). For the 1.3 cents per minute estimate, *see* USTA Comments, CC Docket No. 95-185, submission of Jeffrey H. Rohlfs, Harry M. Shooshan III, and Calvin S. Monson, at 9-10.

[2723] *See supra,* Section VII.C.2.b.(2), for a complete discussion of cost estimates for terminations at both the end office and tandem office switches.

[2724] U S West comments in CC Docket No. 95-185 Attachment A (In Response to Dr. Gerald Brock by Professor Robert G. Harris), p. 11-14.

[2725] *See, e.g.*, AT&T comments in CC Docket No. 95-185 at Attachment (Declaration of Bruce M. Owen), p. 5-6.

[2726] Steven R. Brenner and Bridger M. Mitchell, CTIA *ex parte* briefing, CC Docket No. 95-185, Mar. 21, 1996.

B. ACCESS TO RIGHTS OF WAY

1. Overview

1119. Section 251(b)(4) imposes upon each LEC the "duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224."[2727] The access provisions of section 224, as amended by the 1996 Act, differ from the requirements of section 251(b)(4) with respect to both the entities required to grant access and the entities that may demand access. Section 224(f)(1) imposes upon all utilities,[2728] including LECs, the duty to "provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."[2729] For purposes of section 224, the term "telecommunications carrier" excludes any incumbent LEC as that term is defined in section 251(h).[2730]

1120. In the NPRM, we sought comment on various aspects of this access requirement, as well as on section 224(f)(2) which creates the following limited exception to the obligations of section 224(f)(1):

> Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.[2731]

1121. Additionally, we sought comment on section 224(h), which provides:

> Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing

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[2727] 47 U.S.C. § 251(b)(4).

[2728] A "utility" is "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-ways used, in whole or in part, for wire communications," but does not include any railroad, any cooperative, or any federally or state-owned entities. 47 U.S.C. § 224(a)(1).

[2729] 47 U.S.C. § 224(f)(1). *See* 47 U.S.C. § 153(44) (definition of "telecommunications carrier").

[2730] 47 U.S.C. § 224(a)(5).

[2731] 47 U.S.C. § 224(f)(2).

attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.[2732]

1122. In this Order, we establish rules implementing these provisions. Based on the comments received and the plain language of the statute, and in furtherance of our original mandate to institute an expeditious procedure for determining just and reasonable pole attachment rates with a minimum of administrative costs and consistent with fair and efficient regulation,[2733] we adopt herein a program for nondiscriminatory access to poles, ducts, conduits and rights-of-way. This Order includes several specific rules as well as a number of more general guidelines that are designed to give parties flexibility to reach agreements on access to utility-controlled poles, ducts, conduits, and rights-of-way, without the need for regulatory intervention. We provide for expedited dispute resolution when good faith negotiations fail, and we establish requirements concerning modifications to pole attachments and the allocation of the cost of such modifications. We also explain the division of responsibility between federal and state regulation envisioned by the 1996 Act.

2. Section 224(f): Non-discriminatory access

a. Background

1123. Pursuant to section 224(f)(1), a utility must grant telecommunications carriers and cable operators nondiscriminatory access to all poles, ducts, conduits, and rights-of-way owned or controlled by the utility.[2734] This directive seeks to ensure that no party can use its control of the enumerated facilities and property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields. Section 224(f)(1) appears to mandate access every time a telecommunications carrier or cable operator seeks access to the utility facilities or property identified in that section, with a limited exception allowing electric utilities to deny access "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."[2735] While Congress recognized the legitimate interests of utilities in protecting and promoting the safety and reliability of their core services, on balance we believe section 224(f) reflects Congress' determination that

[2732] 47 U.S.C. § 224(h).

[2733] S. Rep. No. 580, 95th Cong., 1st Sess. 19 (1977).

[2734] As noted, a utility's obligations under section 224(f)(1), however, do not extend to incumbent LECs which are excluded from the definition of "telecommunications carriers" under section 224(a)(5). *See infra*, Section E(3)(c) for a discussion of the incorporation of this provision into section 251(b)(4).

[2735] 47 U.S.C. § 224(f)(2).

utilities generally must accommodate requests for access by telecommunications carriers and cable operators.

b. Comments

1124. The comments relating to nondiscriminatory access describe in substantial detail a wide variety of largely technical issues and concerns. We will review the finer points raised by commenters in subsequent discussion sections devoted to particular issues. Here, we discuss the comments to the extent they provide an overview of access issues and we summarize the positions of the parties generally.

1125. NEES states that, historically, providers of electric and telephone services have installed and maintained transmission and distribution lines overhead and underground.[2736] According to NEES, the methods by which utilities install and maintain facilities vary depending upon a number of factors, including the type of utility service provided, the specific type of equipment being used, and various local conditions and regulations. Utilities state that their facilities often occupy public rights-of-way with other utilities or are constructed on private property pursuant to easements granted by the property owners.[2737] Utilities often are empowered to take property by eminent domain in order to install facilities and provide service.[2738] Because of economic factors and space considerations, new entrants in the utility fields, as well as providers of cable television and other services, generally must "piggyback" on the poles and conduits of the incumbent utilities in order to provide service.[2739]

1126. The relationship between the general access requirement of section 224(f)(1) and the limited exception contained in section 224(f)(2) reflects long-standing, and sometimes contentious, relationships between utilities and various service providers seeking access to those facilities.[2740] Historically, access to utility poles, conduits, and other facilities has been governed by private pole attachment agreements entered into between the parties in accordance with a patchwork of federal, state, and local regulations and industry

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[2736] Facilities used to transport electricity generally can be divided into transmission facilities and distribution facilities. Transmission facilities deliver bulk power at high voltages across long distances for the ultimate use of a large number of customers. Distribution facilities deliver electricity at lower voltages to individual subscribers within a community. Electric transmission and distribution lines can be installed either on overhead poles and towers, or within underground ducts and conduit. NEES comments at 3.

[2737] PECO comments at 2-3; NEES comments at 4.

[2738] PECO comments at 2-3; Duquesne comments at 14-15.

[2739] *See* Cole comments at 1-3 & n. 1-5.

[2740] *See* Cole comments at 1-7; GST comments at 4.

standards.[2741] Commenters extensively debate the extent to which our rules implementing section 224(f)(1) and (f)(2) should incorporate various aspects of these standards and requirements. Many utilities claim that existing regulations and standards, including those imposed unilaterally by individual utility companies, should continue to be observed.

1127. Generally, utilities argue that the nondiscrimination obligations set forth in the Act should not be triggered when a utility's facility has not previously been used by cable or telecommunications service providers.[2742] Requiring access accommodation, it is argued, may constitute a taking under the Fifth Amendment takings clause because the right to exclude others from the facility is an inherent attribute of property ownership that would be compromised by mandated access provisions.[2743] Alternatively, some parties suggest that, if access is allowed, utilities should have substantial discretion to set the terms and conditions of such access depending on the nature of the service involved because different technologies present varying levels of risk.[2744] Utilities contend that a wide variety of issues arise in the pole attachment context and that national rules governing questions of access would fail to accommodate the range of concerns that could justify a denial of access.[2745] For this reason, they request that the Commission eschew national rules in favor of individual case adjudication when a cable operator or telecommunications carrier is denied access to a utility's pole or other facility.[2746] Electric utilities, in their comments, request that distinctions be made between facilities used for electric power and those used for other services, including telecommunications services.

1128. On the issue of capacity constraints, utilities strongly favor explicit provisions that would allow utilities to reserve capacity sufficient to meet future needs.[2747] They suggest space reservations are critical to enable utilities to meet expansion plans and ensure the fulfillment of existing obligations. For example, reserve space may be needed for the emergency replacement of failed components.[2748] Although

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[2741] American Electric comments at 26; Delmarva reply at 7.

[2742] UTC comments at 6-7.

[2743] American Electric Power comments at 7-10. We discuss these comments in more detail in a separate section devoted to constitutional issues. *See infra*, Section C.

[2744] ConEd comments at 12.

[2745] Carolina Power & Light comments at 4; Virginia Electric comments at 13; American Electric comments at 32-38.

[2746] Duquesne Light comments at 3-4; Public Service Company of New Mexico comments at 5-7; NEES comments at 15.

[2747] PECO comments at 7-8; Duquesne comments at 17; NU System Companies comments at 4-5; American Electric comments at 23-24.

[2748] NU System Companies comments at 5;

capacity can sometimes be expanded, utilities argue for authority to deny access when providing access would require the expansion of existing capacity.[2749] If Congress intended utilities to expand existing capacity to accommodate new service providers, they argue, it would have granted utilities the power of eminent domain for this purpose.[2750]

1129. Utility commenters present various approaches to determining the amount of reserved capacity that should be recognized under the Commission's rules. Some oppose precise quantifiable reservations, advocating instead a case-by-case adjudication of the allowed reservation with deference to a utility's prior practices.[2751] At least one commenter, however, supports quantifiable limits as a safe harbor for access denials and suggests that a utility be permitted to reserve of 25% of remaining pole space.[2752]

1130. As for safety and reliability factors upon which access can be denied, utilities urge the Commission to resist the adoption of specific rules because the circumstances affecting safety and reliability are too diverse for precise regulatory packaging. One commenter suggests that the method of delivering electricity varies among utilities and a single set of safety rules would not account for these varying delivery methods.[2753] Although utilities have indicated that some broad national safety standards, such as the National Electric Safety Code ("NESC"),[2754] may be useful to guide parties regarding access generally, they argue stricter standards beyond such accepted codes would not be workable. Instead, utilities propose case-by-case adjudication of disputes because the range of applicable circumstances will frustrate attempts at regulatory specificity.[2755]

1131. To some degree, the comments of LECs reflect concerns similar to those expressed by electric utilities. With respect to the definition of nondiscrimination, however, the Commission received a diverse range of opinion from LEC commenters. Some LECs argue that nondiscrimination does not require parity with the access terms that a facility owner provides to itself because the statute does not explicitly

[2749] American Electric comments at 21; Kansas City Power & Light comments at 3.

[2750] New Mexico Public Service comments at 15.

[2751] Duquesne comments at 17; NU System Companies comments at 5.

[2752] ConEd comments at 10.

[2753] Duquesne comments at 21.

[2754] 1993 National Electric Safety Code, Institute of Electrical and Electronics Engineers, Inc. (1992).

[2755] PECO comments at 6; NEES comments at 14.

require such parity,[2756] or because requiring parity would work an unconstitutional taking by relegating a facility owner to non-owning status.[2757] Other LECs argue that nondiscrimination obligates facility owners to provide access similar to what the owner provides to itself for similar uses.[2758] Another commenter suggests that the requirement of nondiscrimination prohibits discrimination against entities competing against the facility owner's affiliate, but does not necessarily require parity as long as the facility owner does not impose unreasonable impediments on the use of the facility by unaffiliated entities.[2759]

1132. Generally, LECs oppose detailed rules regarding nondiscrimination and access, arguing in favor of flexibility to accommodate individual circumstances,[2760] and to promote private industry negotiation.[2761] LEC commenters cite a variety of situations that, in their view, present circumstances that cannot be regulated beyond the articulation of broad guidelines or principles. They argue against the imposition of standards for determining sufficient capacity because utilities need flexibility to make good faith judgments about future service demands.[2762] One LEC commenter, however, advocates capacity reservations based on a five-year business forecast.[2763]

1133. Similarly, LECs oppose specific standards governing access denials due to safety and engineering concerns. LECs argue that municipal rules have governed this area for years, obviating the need for federal guidelines.[2764] In their view, established safety codes exist and additional standards imposed at the federal level may conflict with these accepted standards.[2765] A wide variety of concerns could affect the safety and reliability of a network and attachments to poles within a network, according to commenters, including wind resistance, local height regulations, working space requirements between

[2756] Ameritech comments at 34; PacTel comments at 19-20.

[2757] GTE comments at 23-24.

[2758] Bell Atlantic comments at 13; NYNEX comments at 14.

[2759] PacTel comments at 19-21.

[2760] PacTel comments at 18.

[2761] SBC comments at 15-16; GTE comments at 22-23; Rural Tel. Coalition at 10.

[2762] USTA comments at 10; Ameritech comments at 37; BellSouth comments at 14-15; PacTel comments at 20.

[2763] SBC comments at 18-19.

[2764] Ameritech comments at 38; GTE comments at 25-26; BellSouth comments at 16-17.

[2765] GTE comments at 25-26; Bell Atlantic comments at 14.

attachments, national safety codes and federal and state occupational safety rules.[2766] Although the precise language of section 224(f)(2) allows electric utilities to deny access for safety, reliability, and engineering concerns, LECs contend they confront the same concerns and need the same authority to deny access when safety or network reliability is jeopardized.[2767]

1134. IXCs argue that nondiscrimination requires an incumbent LEC to provide access on the same terms and conditions that apply to the incumbent LEC or its affiliate.[2768] One IXC suggests that all users of poles and rights-of-way should pay the same rate regardless of the service provided. Under this view, uniform pricing would promote incipient competition.[2769] IXCs contend, however, that access obligations are not reciprocal or symmetrical under section 224. Rather, they contend regulatory asymmetry is required under section 251(b)(4) because that section incorporates section 224 which specifically exempts incumbent LECs from the class of entities entitled to access.[2770]

1135. On capacity questions, IXCs argue strongly for limits on the amount of capacity utilities can reserve for future use. Essentially, they contend the reservation of space, if allowed at all, must be circumscribed by precise standards. For example, a reservation might be allowed for use within a one-year forecast period.[2771] IXCs also contend that claims of insufficient capacity must be scrutinized carefully and that LECs, to the extent they deny access due to capacity constraints, must carry the burden of proving access requests from competitors cannot be accommodated.[2772]

1136. As for safety and reliability concerns, AT&T argues for specific standards to define circumstances under which access can be denied. Whether or not quantifiable standards are adopted, AT&T suggests that the burden of proof should be on utilities to prove they meet applicable standards because utilities or other facility owners, rather than the parties requesting attachments, would have access to information needed to evaluate a particular claim.[2773] Moreover, AT&T argues, under the literal terms of

[2766] BellSouth comments at 16-17.

[2767] Bell Atlantic comments at 14; Ameritech comments at 38; NYNEX comments at 14.

[2768] MCI comments at 21; Sprint comments at 16.

[2769] Sprint comments at 17-18.

[2770] *See* 47 U.S.C. § 224(a)(5); AT&T reply at 24. One LEC argues, however, that section 251 obligations apply to all LECs, including IXCs if they become LECs within the meaning of the Act. PacTel reply at 23.

[2771] AT&T comments at 16.

[2772] MCI comments at 23; AT&T comments at 17; Sprint comments at 16-17.

[2773] AT&T comments at 17-18.

section 224(f)(2), only electric utilities, not incumbent LECs, have explicit authority to justify access denials based on safety, reliability or engineering concerns.[2774]

1137. CAPS favor a literal construction of nondiscrimination, arguing that a loose definition of the term could entice incumbent LECs and utilities to obstruct competition.[2775] Despite recognition that, for the most part, incumbent LECs have been cooperative in allowing access to poles, they contend that on several occasions, LECs and utilities have obstructed such access.[2776] With respect to capacity sufficiency, CAPS agree with LECs that available capacity is a fact-dependent issue, but encourage the Commission to establish standards that would ensure access when existing facilities can be configured to accommodate new telecommunications entrants.[2777] In addition, they support placing the burden of proof to justify denials of access on LECs and utilities subject to an audit of LEC outside plant records.[2778] Similarly, with respect to safety and reliability issues, CAPS advocate the adoption of standards requiring quantifiable threats to safety or reliability before access can be denied.[2779] They, along with the Telecommunications Resellers Association, also favor imposing proof burdens on LECs and utilities in such cases.[2780] In addition, CAPS support limits on survey or engineering fees that utilities may charge before proceeding with a competitor's attachment or other facility installation.[2781]

1138. Cable operators emphasize that access to poles, conduits and other facilities of LECs and utilities is critical to their ability to compete in the provision of telecommunications services as facilities-based competitors.[2782] Generally, cable operators support a definition of nondiscrimination that ensures that utilities cannot provide access to their facilities that is inferior to that provided to themselves or their

[2774] AT&T reply at 11.

[2775] American Communications Services comments at 6.

[2776] American Communications Services comments at 6; GST Telecom comments at 4.

[2777] MFS comments at 10; American Communications Services comments at 7.

[2778] American Communications Services comments at 7; MFS comments at 11.

[2779] MFS comments at 11; GST Telecom comments at 5.

[2780] MFS comments at 11; GST Telecom comments at 5; Telecommunications Resellers Assn. comments at 13.

[2781] MFS comments at 11; GST Telecom comments at 6.

[2782] NCTA comments at 3-4.

affiliates.[2783] Moreover, small cable operators expressed support for the adoption of detailed national rules which they contend will strengthen their ability to negotiate acceptable pole attachment terms.[2784]

1139. With respect to capacity concerns, cable operators urge the Commission to construe narrowly the conditions under which access can be denied based on claims of insufficient capacity. Because access is critical to facilities-based competition, they argue, the Commission should adopt capacity standards that presume the availability of access as long as the new competitor can overcome whatever obstacles stand in the way of making the pole or facility capable of additional attachments.[2785] To underscore the importance of access to facilities-based competition, NCTA notes that Congress explicitly incorporated access to poles, conduits and rights-of-way in both section 251(b)(4) and section 271(c)(2) of the 1996 Act, recognizing that accessibility to such facilities is critical to finding genuine competition in the provision of local exchange service.[2786]

1140. Similarly, with regard to access denials based on claims of safety, reliability or engineering concerns, cable operators support using the NESC as the benchmark for resolving disputes over such issues. To the degree factors or standards other than those set forth in the NESC are relied upon to justify access, cable operators support a presumption that such denials are unreasonable and support the imposition of proof burdens on any LEC or utility making such claims.[2787]

1141. In their comments, state commissions emphasize their experience in dealing with pole attachment issues. One state commission indicates that its procedures for handling disputes concerning access to poles, conduits, and rights-of-way are sufficient and that any changes in procedures are unnecessary at this time.[2788] Moreover, state Commissions emphasize that the statute itself recognizes the prominent role of state and local regulation in the area of pole attachments, citing the preservation of state preemption of federal rules when a state has regulated in this area.[2789]

[2783] Cole comments at 18.

[2784] Small Cable Business Association Comments at 21.

[2785] Summit comments at 1; Cole comments at 17.

[2786] NCTA comments at 12.

[2787] NCTA comments at 12; Cole comments at 18.

[2788] Illinois Commission comments at 72.

[2789] District of Columbia Commission comments at 9.

1142. With respect to the definition of nondiscrimination, state commissions urge us to ensure that incumbent LECs provide access to poles and other facilities on terms that do not discriminate unreasonably between similarly situated carriers.[2790] The Ohio Consumers' Counsel agrees, suggesting that nondiscrimination requires that LECs provide competitors access on the same terms it provides to itself or its affiliates.[2791] As for the various reasons that may be asserted to justify denial of access, the Ohio Commission and Ohio Consumers' Counsel argue that a heavy burden should be placed on the LEC or utility denying access to demonstrate whenever capacity constraints, safety issues or reliability concerns are claimed for the access denial.[2792]

c. Discussion

(1) Generally

1143. We conclude that the reasonableness of particular conditions of access imposed by a utility should be resolved on a case-specific basis. We discuss below the forum for such resolutions.[2793] The record makes clear that there are simply too many variables to permit any other approach with respect to access to the millions of utility poles and untold miles of conduit in the nation.[2794] The broader access mandated by the Act, in conjunction with the reasonableness variables mentioned here, will likely increase the number of disputes over access. In turn, this may cause small incumbent LECs and small entities to incur the need for additional resources to evaluate, process, and resolve such disputes, as well as to make poles and conduits physically accessible.[2795] We will not enumerate a comprehensive regime of specific rules, but instead establish a few rules supplemented by certain guidelines and presumptions that we believe will facilitate the negotiation and mutual performance of fair, pro-competitive access agreements. We will monitor the effect of this approach and propose more specific rules at a later date if reasonably necessary to facilitate access and the development of competition in telecommunications and cable services. We believe that the rules, guidelines and presumptions established herein strike the appropriate balance

[2790] Illinois Commission comments at 73-74; Texas Commission comments at 3; California Commission comments at 5.

[2791] Ohio Consumers' Counsel comments at 5-6.

[2792] Ohio Commission comments at 11-12; Ohio Consumers' Counsel comments at 5-6.

[2793] *See infra*, Section E.

[2794] Delmarva comments at 6.

[2795] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

between the need for uniformity, on the one hand, and the need for flexibility, on the other, which should minimize the regulatory burdens and economic impact for both small entities and small incumbent LECs.[2796]

1144. We also address the impact on small incumbent LECs. For example, the Rural Telephone Coalition opposes adoption of sweeping national rules because local circumstances will be relevant to disputes over access to poles or rights-of-way.[2797] We have considered the economic impact of our rules in this section on small incumbent LECs. For example, we have adopted a flexible regulatory approach to pole attachment disputes that ensures consideration of local conditions and circumstances.

1145. Our determination not to prescribe numerous specific rules is supported by acknowledgements in the relevant national industry codes that no single set of rules can take into account all of the issues that can arise in the context of a single installation or attachment. The NESC, one of the national codes that virtually all commenters regard as containing reasonable attachment requirements, contains thousands of rules and dozens of tables and figures, all designed to ensure "the practical safeguarding of persons during the installation, operation, or maintenance of electric supply and communication lines and associated equipment."[2798]

1146. For example, with respect to overhead wires, the NESC contains 64 pages of rules dictating minimum "clearances," i.e., the minimum separations between a particular wire, cable, or other piece of equipment and other wires, cables, equipment, structures, and property.[2799] A short list of only a few of the variables in that discussion includes: the type of wire or equipment in question; the type of current being transmitted; the nature of the structure supporting the wires; the proximity and nature of other equipment and structures; the temperature of the conducting element; and the use of the land below the wires. These separation requirements dictate the required distances between various wires and other transmission and distribution equipment, as well distances between such equipment and other objects that are not a part of the transmission and distribution network. Prescribed separations between wires will vary between the point at which wires are attached to a pole and at mid-points between poles, with the latter separations dictated by the predicted amount of sag that the wires will experience. The amount of sag will itself depend upon additional variables. Changing just one variable can radically alter the separation requirements.[2800]

[2796] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

[2797] RTC comments at 14.

[2798] NESC § 010.

[2799] NESC § 23.

[2800] For example, depending upon other conditions there are at least 16 potentially applicable clearance requirements relating specifically to wires passing over or near swimming pools. Separate sets of clearance requirements apply to wires in the vicinity of rail cars, and for wires attached near bridges.

Other rules dictate: electrical loading requirements that vary depending upon wind and ice conditions and the predicted sag of the lines being installed; structural strength requirements that vary depending upon the amount and type of installations and the nature of the supporting structure; and line insulation requirements. A wholly separate and equally extensive array of rules apply to underground lines.

1147. Despite this specificity, the introduction to the NESC states that the code "is not intended as a design specification or an instruction manual."[2801] Indeed, utilities typically impose requirements more stringent than those prescribed by NESC and other industry codes.[2802] In some cases stricter requirements and restrictions are dictated by federal, state, or local law.[2803] Potentially applicable federal regulations include rules promulgated by the Federal Energy Regulatory Commission ("FERC") and by the Occupational Safety and Health Administration ("OSHA").[2804] Various restrictions can apply at the state level as well.[2805] Some local requirements governing zoning, aesthetics, or road clearances impose more stringent or more specific requirements than those of the national industry codes or of federal or state law.[2806]

1148. In addition to operating under federal, state, and local requirements, a utility normally will have its own operating standards that dictate conditions of access.[2807] Utilities have developed their own individual standards and incorporated them into pole attachment agreements because industry-wide standards and applicable legal requirements are too general to take into account all of the variables that can arise.[2808] A utility's individual standards cover not simply its policy with respect to attachments, but all aspects of its business. Standards vary between companies and across different regions of the country

[2801] NESC § 010.

[2802] NU comments at 4-5; BellSouth comments at 16-17; Virginia Electric comments at 10-12; Carolina comments at 4; NEES comments at 11.

[2803] NEES comments at 6, 11; PECO comments at 2; Duquesne comments at 11-12; Virginia comments at 11-12

[2804] Texas Commission comments at 4; NEES comments at 11; American Electric comments at 25. *See* 29 C.F.R. §§ 1910.268, 1910.269.

[2805] NEES comments at 6 (*citing* Massachusetts statute prohibiting electric utilities from permitting attachments to their transmission facilities); Duquesne comments at 11-12 (describing similar restriction under Wisconsin law).

[2806] American Electric comments at 36; Delmarva comments at 10-11; Ameritech comments at 38; PECO comments at 2.; Duquesne comments at 11-13; ConEd comments at 11.

[2807] American comments at 26, 36; NEES comments at 11.

[2808] Virginia Power comments at 13; NEES comment at 11; NU comments at 4-5.

based on the experiences of each utility and on local conditions.[2809] As Duquesne notes, the provision of electricity is the result of varied engineering factors that continue to evolve.[2810] Because there is no fixed manner in which to provide electricity, there is no way to develop an exhaustive list of specific safety and reliability standards.[2811] In addition, increasing competition in the provision of electricity is forcing electric utilities to engineer their systems more precisely, in a way that is tailored to meet the specific needs of the electric company and its customers.[2812] As a result, each utility has developed its own internal operating standards to suit its individual needs and experiences.[2813]

1149. The record contains numerous factors that may vary from region to region, necessitating different operating procedures particularly with respect to attachments. Extreme temperatures, ice and snow accumulation, wind, and other weather conditions all affect a utility's safety and engineering practices.[2814] In some instances, machinery used by local industries requires higher than normal clearances. Particular utility work methods and equipment may require specific separations between attachments and may restrict the height of the poles that a utility will use.[2815] The installation and maintenance of underground facilities raise distinct safety and reliability concerns.[2816] It is important that such variables be taken into account when drafting pole attachment agreements and considering an individual attachment request. The number of variables makes it impossible to identify and account for them all for purposes of prescribing uniform standards and requirements.[2817] Universally accepted codes such as the NESC do not attempt to prescribe specific requirements applicable to each attachment request and neither shall we.

1150. We are sensitive to concerns of cable operators and telecommunications carriers regarding utility-imposed restrictions that could be used unreasonably to prevent access.[2818] We note in particular

[2809] ConEd comments at 5; Duquesne comments at 7; NEES comments at 11.

[2810] Duquesne comments at 21.

[2811] *Id.*; UTC reply at 20.

[2812] Duquesne comments at 21.

[2813] ConEd reply at 2.

[2814] NEES comments at 11; Carolina comments at 4; American Electric comments at 31.

[2815] American Electric comments at 20; NEES comments at 11; Carolina comments at 4.

[2816] ConEd comments at 7; Kansas City comments at 3-4; UTC reply at 20.

[2817] American Electric comments at 18-20, 36; Delmarva reply at 7-8.

[2818] Cole comments 3-7.

that a utility that itself is engaged in video programming or telecommunications services has the ability and the incentive to use its control over distribution facilities to its own competitive advantage. A number of utilities have obtained, or are seeking, the right and ability to provide telecommunications or video programming services.[2819] We agree, however, with Duquesne that the best safeguard is not the adoption of a comprehensive set of substantive engineering standards, but the establishment of procedures that will require utilities to justify any conditions they place on access.[2820] These procedures are outlined in section E below. In the next two sections, we set forth rules of general applicability and broader guidelines relating to specific issues that are intended to govern access negotiations between the parties.

(2) Specific Rules

1151. We establish five rules of general applicability. First, in evaluating a request for access, a utility may continue to rely on such codes as the NESC to prescribe standards with respect to capacity, safety, reliability, and general engineering principles. We have no reason to question the reasonableness of the virtually unanimous judgment of the commenters, many of whom have otherwise diverse and conflicting interests, in this regard.[2821] Utilities may incorporate such standards into their pole attachment agreements in accordance with section 224(f)(2). Other industry codes also will be presumed reasonable if shown to be widely-accepted objective guides for the installation and maintenance of electrical and communications facilities.

1152. Second, federal requirements, such as those imposed by FERC and OSHA, will continue to apply to utilities to the extent such requirements affect requests for attachments to utility facilities under section 224(f)(1). We see no reason to supplant or modify applicable federal regulations promulgated by FERC, OSHA, or other federal agencies acting in accordance with their lawful authority.

1153. Third, we will consider state and local requirements affecting pole attachments. We note that section 224(c)(1) provides:

> Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms and conditions, or access to poles, ducts, conduits, and rights-

[2819] Cole reply at 3-7.

[2820] Duquesne comments at 21.

[2821] Cole comments at 22; American Electric comments at 22; NCTA reply at 6-7; UTC reply at 15-16; Virginia Power reply at 6; Ohio Edison reply at 23-24.

of-way as provided in subsection (f), for pole attachments in any case where such matters are regulated by the State.[2822]

1154. In a separate section we discuss the authority of a state to preempt federal regulation of pole attachments.[2823] For present purposes, we conclude that state and local requirements affecting attachments are entitled to deference even if the state has not sought to preempt federal regulations under section 224(c).[2824] The 1996 Act increased significantly the Commission's role with respect to attachments by creating federal access rights and obligations, which for decades had been the subject of state and local regulation. Such regulations often relate to matters of local concern that are within the knowledge of local authorities and are not addressed by standard codes such the NESC.[2825] We do not believe that regulations of this sort necessarily conflict with the scheme established in this Order. More specifically, we see nothing in the statute or in the record that compels us to preempt such local regulations as a matter of course. Regulated entities and other interested parties are familiar with existing state and local requirements and have adopted operating procedures and practices in reliance on those requirements. We believe it would be unduly disruptive to invalidate summarily all such local requirements. We thus agree with commenters who suggest that such state and local requirements should be presumed reasonable.[2826] Thus, even where a state has not asserted preemptive authority in accordance with section 224(c), state and local requirements affecting pole attachments remain applicable, unless a complainant can show a direct conflict with federal policy. Where a local requirement directly conflicts with a rule or guideline we adopt herein, our rules will prevail. We note that a standard prescribed by the NESC is not a specific Commission rule, and therefore a state requirement that is more restrictive than the corresponding NESC standard may still apply.

1155. It is important to note that the discretion of state and local authorities to regulate in the area of pole attachments is tempered by section 253, which invalidates all state or local legal requirements that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[2827] This restriction does not prohibit a state from imposing "on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services,

[2822] 47 U.S.C. § 224(c)(1).

[2823] *See infra,* Section E.

[2824] New Mexico comments at 12; Ohio comments at 11.

[2825] *See supra*, Section B.2.

[2826] PECO comments at 2; Kansas City comments at 2-3; NEES reply at 13.

[2827] 47 U.S.C. § 253(a).

and safeguard the rights of consumers."[2828] In addition, section 253 specifically recognizes the authority of state and local governments to manage public rights-of-way and to require fair and reasonable compensation for the use of such rights-of-way.[2829]

1156. Fourth, where access is mandated, the rates, terms, and conditions of access must be uniformly applied to all telecommunications carriers and cable operators that have or seek access.[2830] Except as specifically provided herein, the utility must charge all parties an attachment rate that does not exceed the maximum amount permitted by the formula we have devised for such use, and that we will revise from time to time as necessary.[2831] Other terms and conditions also must be applied on a nondiscriminatory basis.[2832]

1157. Fifth, except as specifically noted below, a utility may not favor itself over other parties with respect to the provision of telecommunications or video programming services.[2833] We interpret the statutory requirement of nondiscriminatory access as compelling this result, particularly when read in the context of other provisions of the statute. This element of nondiscrimination is evident in section 224(g), which requires a utility to impute to itself or to its affiliate the pole attachment rate such entity would be charged were it a non-affiliated entity.[2834] Further, we believe it unlikely that Congress intended to allow an incumbent LEC to favor itself over its competitors with respect to attachments to the incumbent LEC's facilities, given that section 224(a)(5) has just the opposite effect in that it operates to preclude the incumbent LEC from obtaining access to the facilities of other LECs. A utility will be able to discriminate in favor of itself with respect to the provision of telecommunications or cable services only as expressly provided herein.

1158. Aside from the conditions described above, we will not adopt specific rules to determine when access may be denied because of capacity, safety, reliability, or engineering concerns. In addition,

[2828] 47 U.S.C. § 253(b); section 254 sets forth specific provisions related to universal service.

[2829] 47 U.S.C. § 253(c). *See* Ameritech reply at 10.

[2830] 47 U.S.C. § 224(f)(1). As noted above, incumbent LECs are excluded from the definition of "telecommunications carrier" for purposes of section 224. 47 U.S.C. § 224(a)(5).

[2831] *See* 47 C.F.R. § 1.1404.

[2832] *See supra*, Sections IV.G. and V.G. for a discussion of the meaning of "nondiscriminatory."

[2833] 47 U.S.C. § 224(f)(1); *see* Ohio Consumers' Counsel comments at 5; California comments at 5; MCI comments at 21; Sprint comments at 16; ACSI comments at 6-7.

[2834] 47 U.S.C. § 224(g).

we reject the contention of some utilities that they are the primary arbiters of such concerns, or that their determinations should be presumed reasonable.[2835] We recognize that the public welfare depends upon safe and reliable provision of utility services, yet we also note that the 1996 Act reinforces the vital role of telecommunications and cable services. As noted above, section 224(f)(1) in particular reflects Congress' intention that utilities must be prepared to accommodate requests for attachments by telecommunications carriers and cable operators.

(3) Guidelines Governing Certain Issues

1159. In addition to the rules articulated above, we will establish guidelines concerning particular issues that have been raised in this proceeding. These guidelines are intended to provide general ground rules upon which we expect the parties to be able to implement pro-competitive attachment polices and procedures through arms-length negotiations, rather than having to rely on multiple adjudications by the Commission in response to complaints or by other forums. We do not discuss herein every issue raised in the comments. Rather, we discuss only major issues that we believe will arise often. Issues not discussed herein may be important in a particular case, but are not susceptible to any general observation or presumption.

1160. We note that a utility's obligation to permit access under section 224(f) does not depend upon the execution of a formal written attachment agreement with the party seeking access. We understand that such agreements are the norm and encourage their continued use, subject to the requirements of section 224. Complaint or arbitration procedures will, of course, be available when parties are unable to negotiate agreements.[2836]

(a) Capacity Expansions

1161. When a utility cannot accommodate a request for access because the facility in question has no available space, it often must modify the facility to increase its capacity.[2837] In some cases, a request for access can be accommodated by rearranging existing facilities to make room for a new attachment.[2838] Another method of maximizing useable capacity is to permit "overlashing," by which a new cable is

[2835] American Electric comments at 14, 21; NEES comments at 14; ConEd comments at 11; Delmarva reply at 8.

[2836] *See infra*, Section E.

[2837] Cole comments at 9; ConEd comments at 10; MFS comments at 10; NCTA reply at 5-6.

[2838] GST Telecom comments at 5.

wrapped around an existing wire, rather than being strung separately.[2839] A utility pole filled to capacity often can be replaced with a taller pole.[2840] New underground installations can be accommodated by the installation of new duct, including subducts that divide a standard duct into four separate, smaller ducts.[2841] Cable companies and others contend that there is rarely a lack of capacity given the availability of taller poles and additional conduits.[2842] These commenters suggest that utilities should rarely be permitted to deny access on the basis of a lack of capacity, particularly since under section 224(h) the party or parties seeking to increase capacity will be responsible for all associated costs.[2843] Utilities argue that neither the statute nor its legislative history requires facility owners to expand or alter their facilities to accommodate entities seeking to lease space.[2844] These commenters argue that, if Congress intended such a result, the statute would have imposed the requirement explicitly.[2845]

1162. A utility is able to take the steps necessary to expand capacity if its own needs require such expansion. The principle of nondiscrimination established by section 224(f)(1) requires that it do likewise for telecommunications carriers and cable operators.[2846] In addition, we note that section 224(f)(1) mandates access not only to physical utility facilities (*i.e.*, poles, ducts, and conduit), but also to the rights-of-way held by the utility. The lack of capacity on a particular facility does not necessarily mean there is no capacity in the underlying right-of-way that the utility controls. For these reasons, we agree with commenters who argue that a lack of capacity on a particular facility does not automatically entitle a utility to deny a request for access. Since the modification costs will be borne only by the parties directly benefitting from the modification,[2847] neither the utility nor its ratepayers will be harmed, despite the assertions of utilities to the contrary.[2848]

[2839] MFS comments at 10; GST Telecom comments at 5.

[2840] Cole comments at 14-15.

[2841] GST Telecom comments at 5; Cole comments at 17.

[2842] Cole comments at 15.

[2843] NCTA comments at 12; Summit comments at 1; MCI comments at 23.

[2844] American Electric reply at 19; ConEd reply at 5; U S West reply at 7; GTE reply at 26; Virginia Power reply at 5.

[2845] SBC reply at 21.

[2846] AT&T reply at 14-15; MFS reply at 22. We note that this standard differs from the one we adopt for collocation of equipment on incumbent LEC premises under section 251(c)(6). *See supra*, Section VI.

[2847] *See infra*, Section 2(b).

[2848] *See, e.g.,* Ohio Ed reply at 19.

1163. In some cases, however, increasing capacity involves more than rearranging existing attachments or installing a new pole or duct. For example, the record suggests that utility poles of 35 and 40 feet in height are relatively standard, but that taller poles may not always be readily available.[2849] The transportation, installation, and maintenance of taller poles can entail different and more costly practices.[2850] Many utilities have trucks and other service equipment designed to maintain poles of up to 45 feet, but no higher.[2851] Installing a 50 foot pole may require the utility to invest in new and costly service equipment.[2852] Expansion of underground conduit space entails a very complicated procedure, given the heightened safety and reliability concerns associated with such facilities.[2853] Local regulators may seek to restrict the frequency of underground excavations. We find it inadvisable to attempt to craft a specific rule that prescribes the circumstances in which, on the one hand, a utility must replace or expand an existing facility in response to a request for access and, on the other hand, it is reasonable for the utility to deny the request due to the difficulties involved in honoring the request. We interpret sections 224(f)(1) and (f)(2) to require utilities to take all reasonable steps to accommodate requests for access in these situations. Before denying access based on a lack of capacity, a utility must explore potential accommodations in good faith with the party seeking access.

1164. We will not require telecommunications providers or cable operators seeking access to exhaust any possibility of leasing capacity from other providers, such as through a resale agreement, before requesting a modification to expand capacity.[2854] As indicated elsewhere in this Order, resale will play an important role in the development of competition in telecommunications. However, as we also have noted, there are benefits to facilities-based competition as well. We do not wish to discourage unduly the latter form of competition solely because the former might better suit the preferences of incumbent utilities with respect to pole attachments.

(b) Reservation of space by utility

[2849] NEES comments at 8; Cole comments at 15.

[2850] Carolina comments at 3-4; American Electric comments at 23.

[2851] NEES comments at 8-9.

[2852] UTC reply at 17.

[2853] American Electric comments at 20, 31; ConEd comments at 7; Kansas City comments at 3-4; UTC comments at 18. Some commenters assert that expanding conduit capacity is impractical. Delmarva reply at 7.

[2854] *See* PNM comments at 20; Carolina comments at 5; American Electric reply at 14.

1165. Utilities routinely reserve space on their facilities to meet future needs.[2855] Local economic growth and property development may require an electric utility to install additional lines or transformers that use previously available space on the pole.[2856] A utility may install an underground duct in which it can later install additional distribution lines, if necessitated by a subsequent increase in demand or by damage to the original lines.[2857] Reserving space allows the utility to respond quickly and efficiently to changed circumstances. This practice, however, also can result in a utility denying access to a telecommunications carrier or a cable operator even though there is unused capacity on the pole or duct.

1166. This issue is of particular concern because section 224(h) imposes the cost of modifying attachments on those parties that benefit from the modification.[2858] If, for example, a cable operator seeks to make an attachment on a facility that has no available capacity, the operator would bear the full cost of modifying the facility to create new capacity, such as by replacing an existing pole with a taller pole. Other parties with attachments would not share in the cost, unless they expanded their own use of the facilities at the same time. If the electric utility decides to change a pole for its own benefit, and no other parties derive a benefit from the modification, then the electric company would bear the full cost of the new pole.

1167. Some commenters contend that utilities will reserve space on a pole and then claim there is no capacity available, as a way of forcing cable operators and telecommunications carriers to pay for new utility facilities. These commenters contend that we should restrict or eliminate the authority of utilities to reserve space.[2859] Utilities respond that it is unfair to force a utility to accommodate full occupation of its facility by third parties and then to saddle the utility with the cost of modifying the facility when the utility's own needs change and require a costly increase in capacity.[2860]

1168. The near-universal public demand for their core utility services, while imposing certain obligations, arguably entitles utilities to certain prerogatives vis-a-vis other parties, including the right to reserve capacity to meet anticipated future demand for those utility services.[2861] Recognition of such a right,

[2855] American Electric comments at 43; UTC reply at 22.

[2856] Virginia Power comments at 8; American comments at 23; Connecticut Light comments at 5.

[2857] Ohio Edison comments at 16-17; ConEd comments at 9.; Delmarva reply at 5.

[2858] *See infra*, Section (C)(3).

[2859] MCI comments at 23; ACSI comments at 6-8; MFS comments at 7; Time Warner comments at 14; AT&T reply at 14-15.

[2860] AEP comments at 42-43; Duquesne comments at 17; PECO comments at 7; Delmarva comments at 14.

[2861] PNM comments at 8-9; American Electric comments at 13; ConEd reply at 4-5.

however, could conflict with the nondiscrimination requirement of section 224(f)(1) which prohibits a utility from favoring itself or its affiliates with respect to the provision of telecommunications and video services.[2862] In addition, allowing space to go unused when a cable operator or telecommunications carrier could make use of it is directly contrary to the goals of Congress.

1169. Balancing these concerns leads us to the following conclusions. We will permit an electric utility to reserve space if such reservation is consistent with a bona fide development plan that reasonably and specifically projects a need for that space in the provision of its core utility service. The electric utility must permit use of its reserved space by cable operators and telecommunication carriers until such time as the utility has an actual need for that space. At that time, the utility may recover the reserved space for its own use. The utility shall give the displaced cable operator or telecommunications carrier the opportunity to pay for the cost of any modifications needed to expand capacity and to continue to maintain its attachment.[2863] An electric utility may not reserve or recover reserved space to provide telecommunications or video programming service and then force a previous attaching party to incur the cost of modifying the facility to increase capacity, even if the reservation of space were pursuant to a reasonable development plan. The record does not contain sufficient data for us to establish a presumptively reasonable amount of pole or conduit space subject that an electric utility may reserve. If parties cannot agree, disputes will be resolved on a case-by-case approach based on the reasonableness of the utility's forecast of its future needs and any additional information that is relevant under the circumstances.

1170. With respect to a utility providing telecommunications or video services, we believe the statute requires a different result. Section 224(f)(1) requires nondiscriminatory treatment of all providers of such services and does not contain an exception for the benefit of such a provider on account of its ownership or control of the facility or right-of-way. Congress seemed to perceive such ownership and control as a threat to the development of competition in these areas, thus leading to the enactment of the provision in question. Allowing the pole or conduit owner to favor itself or its affiliate with respect to the provision of telecommunications or video services would nullify, to a great extent, the nondiscrimination that Congress required. Permitting an incumbent LEC, for example, to reserve space for local exchange service, to the detriment of a would-be entrant into the local exchange business, would favor the future needs of the incumbent LEC over the current needs of the new LEC. Section 224(f)(1) prohibits such discrimination among telecommunications carriers. As indicated above, this prohibition does not apply when an electric utility asserts a future need for capacity for electric service, to the detriment of a

[2862] Ohio Consumers Counsel comments at 5-6; Delmarva comments at 8.

[2863] This standard differs from the one we adopt for allocation of collocation space under section 251(c)(6). *See supra*, Section VI.

telecommunications carrier's needs, since the statute does not require nondiscriminatory treatment of all utilities; rather, it requires nondiscriminatory treatment of all telecommunications and video providers.

(c) Definition of "Utility"

1171. The access obligations of section 224(f) apply to any "utility," which is defined as:

> any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or other rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.[2864]

1172. Arguably a provider of utility service does not fall within this definition if it has refused to permit any wired communications use of its facilities and rights-of-way since, in that case, its facilities and rights-of-way are not "used, in whole or in part, for wire communications." Under this construction, an electric utility would have no obligation to grant access under section 224(f) until the utility voluntarily has granted access to one communications provider or has used its facilities for wire communications.[2865] Only after its facilities were being used for wire communications would the utility have to grant access to all telecommunications carriers and cable operators on a nondiscriminatory basis.

1173. We conclude that this construction of the statute is mandated by its plain language and is indeed nondiscriminatory, since denial of access to all discriminates against none. We see no statutory basis, however, for the argument made by some utilities that they should be permitted to devote a portion of their poles, ducts, conduits, and rights-of-way to wire communications without subjecting all such property to the access obligations of section 224(f)(1).[2866] Those obligations apply to any "utility," which section 224(a)(1) defines to include an entity that controls "poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications."[2867] The use of the phrase "in whole or in part" demonstrates that Congress did not intend for a utility to be able to restrict access to the exact path used by the utility for wire communications. We further conclude that use of any utility pole, duct, conduit, or right-of-way for wire

[2864] 47 U.S.C. § 224(a)(1).

[2865] NU Systems comments at 2-3; UTC comments at 6-7.

[2866] *See* American Electric comments at 12, n. 7.

[2867] 47 U.S.C. § 224(a)(1).

communications triggers access to all poles, ducts, conduits, and rights-of-way owned or controlled by the utility, including those not currently used for wire communications.

1174. We reject the contention that, because an electric utility's internal communications do not pose a competitive threat to third party cable operators or telecommunications carriers, such internal communications are not "wire communications" and do not trigger access obligations.[2868] Although internal communications are used solely to promote the efficient distribution of electricity, the definition of "wire communication" is broad and clearly encompasses an electric utility's internal communications.[2869]

(d) Application of Section 224(f)(2) to Non-Electric Utilities

1175. While all utilities are subject to the access obligations of section 224(f)(1), the provisions of section 224(f)(2), permitting a utility to deny access due to a lack of capacity or for reasons of safety, reliability, and generally applicable engineering purposes, apply only to "a utility providing electric service . . . ."[2870] Based on this statutory language, some commenters suggest that LECs and other utilities that do not provide electric service must grant requests for access, regardless of any concerns relating to safety, reliability, and general engineering principles.[2871] If there is a lack of capacity, a LEC must create more capacity, according to these commenters.[2872]

1176. While the express language of sections 224(f)(1) and (f)(2) suggests that only utilities providing electric service can take into consideration concerns relating to safety and reliability, we are reluctant to ignore these concerns simply because the pole owner is not an electric utility. Even parties seeking broad access rights under section 224 recognize that, in some circumstances, a LEC will have legitimate safety or engineering concerns that may need to be accommodated.[2873] We believe that Congress could not have intended for a telecommunications carrier to ignore safety concerns when making pole attachment decisions. Rather than reach this dangerous result which would require us to ignore the

[2868] *See* UTC comments at 7; Delmarva reply at 5.

[2869] *See* 47 U.S.C. 3(51) ("The term 'wire communication" . . . means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection . . .").

[2870] 47 U.S.C. § 224(f)(2).

[2871] *See, e.g.,* AT& T comments at 16-17.

[2872] *Id.* at 16-17.

[2873] AT&T reply at 17, n. 40

dictates of sections 1[2874] and 4(o)[2875] of the Communications Act, we conclude that any utility may take into account issues of capacity, safety, reliability and engineering when considering attachment requests, provided the assessment of such factors is done in a nondiscriminatory manner.

1177. Nevertheless, we believe that section 224(f)(2) reflected Congress' acknowledgment that issues involving capacity, safety, reliability and engineering raise heightened concerns when electricity is involved, because electricity is inherently more dangerous than telecommunications services. Accordingly, although we determine that it is proper for non-electric utilities to raise these matters, they will be scrutinized very carefully, particularly when the parties concerned have a competitive relationship.

(e) Third-Party Property Owners

1178. Section 224(f)(1) mandates that the utility grant access to any pole, duct, conduit, or right-of-way that is "owned or controlled by it." Some utilities and LECs argue that certain private easement agreements, when interpreted under the applicable state property laws, deprive the utilities of the ownership or control that triggers their obligation to accommodate a request for access.[2876] Moreover, they contend, access to public rights-of-way may be restricted by state law or local ordinances.[2877] Opposing commenters contend that the addition of cable television or telecommunications facilities is compatible with electric service and therefore does not violate easements that have been granted for the provision of electric service.[2878] These commenters also assert that the statute does not draw specific distinctions between private and public easements.[2879] Further, some cable operators contend that utility easements are accessible to cable operators pursuant to section 621(a)(2) of the Communications Act as long as the easements are physically compatible with such use, regardless of the terms of a written easement agreement.[2880] Another commenter suggests utilities are best positioned to determine when access requests would affect a private easement, foreclosing the need to determine whether a private owner would consent

[2874] 47 U.S.C. § 151 (establishing the Commission for the purpose of promoting a "rapid, efficient Nation-wide, and world-wide wire and radio and communication service with adequate facilities . . . [and] promoting safety of life and property . . .").

[2875] 47 U.S.C. § 154 (o) (promoting the "safety of life and property" with respect to the use of radio and wire communications).

[2876] UTC comments at 7-8; GVNW comments at 9; U S West reply at 6; BellSouth reply at 9; *see* BOMA reply at 3.

[2877] Rural Tel. reply at 4.

[2878] Cole comments at 16-17.

[2879] MFS reply at 16.

[2880] Cole comments at 17; *see* 47 U.S.C. § 541(a)(2).

to the requested attachment.[2881] As for local ordinances restricting access to public rights-of-way, one commenter suggests that such restrictions would violate section 253(a) of the Act, which blocks state or local rules that prohibit competition.[2882]

1179. The scope of a utility's ownership or control of an easement or right-of-way is a matter of state law.[2883] We cannot structure general access requirements where the resolution of conflicting claims as to a utility's control or ownership depends upon variables that cannot now be ascertained. We reiterate that the access obligations of section 224(f) apply when, as a matter of state law, the utility owns or controls the right-of-way to the extent necessary to permit such access.

1180. Section 621(a)(2) states that a cable franchise shall be construed as authorizing the construction of cable facilities in public rights-of-way and "through easements . . . which have been dedicated for compatible uses . . . ."[2884] The scope of a cable operator's access to easements under this provision has been the subject of a number of court opinions.[2885] To the extent section 621(a)(2) has been construed to permit access to easements, a cable operator must be permitted to attach to utility poles, ducts, and conduits within such easements in accordance with section 224(f).

1181. Finally, we disagree with those utilities that contend that they should not be forced to exercise their powers of eminent domain to establish new rights-of-way for the benefit of third parties.[2886] We believe a utility should be expected to exercise its eminent domain authority to expand an existing right-of-way over private property in order to accommodate a request for access, just as it would be required to modify its poles or conduits to permit attachments. Congress seems to have contemplated an exercise of eminent domain authority in such cases when it made provisions for an owner of a right-of-way that "intends to modify or alter such . . . right-of-way . . . ."[2887]

[2881] AT&T reply at 18.

[2882] Sprint reply at 18.

[2883] *See* S. Rep. No. 580, 95th Cong., 1st Sess. 16 (1977).

[2884] 47 U.S.C. § 541(a)(2).

[2885] *TCI of North Dakota, Inc. v. Schriock Holding Co.*, 11 F.3d 812 (8th Cir. 1993); *Media General Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-Owners*, 991 F.2d 1169 (4th Cir. 1993); *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600 (11th Cir.), *cert. den'd*, 506 U.S. 862 (1992); *Cable Investments, Inc. v. Woolley*, 867 F.2d 151 (3d Cir. 1989).

[2886] *But see* UTC comments at 15; Ohio Edison comments at 14-15.

[2887] 47 U.S.C. § 224(h).

(f) Other Matters

1182. Utilities stress the importance of ensuring that only qualified workers be permitted in the proximity of utility facilities. Some utilities seek to limit access to their facilities to the utility's own specially trained employees or contractors, particularly with respect to underground conduits.[2888] According to these commenters, parties seeking to make attachments to utility facilities should be required to pay for the use of the utility's workers if the utility concludes that only its workers are fit for the job. While we agree that utilities should be able to require that only properly trained persons work in the proximity of the utilities' lines, we will not require parties seeking to make attachments to use the individual employees or contractors hired or pre-designated by the utility. A utility may require that individuals who will work in the proximity of electric lines have the same qualifications, in terms of training, as the utility's own workers, but the party seeking access will be able to use any individual workers who meet these criteria. Allowing a utility to dictate that only specific employees or contractors be used would impede the access that Congress sought to bestow on telecommunications providers and cable operators and would inevitably lead to disputes over rates to be paid to the workers.

1183. Some electric utilities argue that high voltage transmission facilities should not be accessible by telecommunications carriers or cable operators under section 224(f)(1).[2889] These commenters contend that transmission facilities, which are used for high voltage transmissions over great distances, are far more delicate and dangerous than local distribution facilities. Permitting attachments to transmission facilities, they argue, poses a greater risk to the safety and reliability of the electric distribution system than is the case with distribution lines. They further state that transmission facilities generally are not located where cable operators and telecommunications carriers need to install facilities. ConEd suggests that transmission towers do not even fall within the scope of the statute.[2890]

1184. Section 224(f)(1) mandates access to "any pole, duct, conduit, or right-of-way," owned or controlled by the utility. The utilities do not suggest that transmission facilities do not use poles or rights-of-way, for which the statute does mandate the right of access. The utilities' arguments for excepting transmission facilities from access requirements are based on safety and reliability concerns. We believe that the breadth of the language contained in section 224(f)(1) precludes us from making a blanket determination that Congress did not intend to include transmission facilities. As with any facility to which access is sought, however, section 224(f)(2) permits the electric utility to impose conditions on access to transmission facilities, if necessary for reasons of safety and reliability. To the extent safety and reliability

[2888] Kansas City at 3-4.

[2889] NEES comments at 15-16; PECO comments at 4.

[2890] ConEd comments at 6.

concerns are greater at a transmission facility, the statute permits a utility to impose stricter conditions on any grant of access or, in appropriate circumstances, to deny access if legitimate safety or reliability concerns cannot be reasonably accommodated.[2891]

1185. We note that some commenters favor a broad interpretation of "pole, duct, conduit, or right-of-way" because that approach would minimize the risk that a "pathway" vital to competition could be shut off to new competitors.[2892] Others argue for a narrow construction of this statutory phrase, contending that Congress addressed access to other LEC facilities elsewhere in the 1996 Act.[2893] We recognize that an overly broad interpretation of this phrase could impact the owners and mangers of small buildings, as well as small incumbent LECs, by requiring additional resources to effectively control and monitor such rights-of-way located on their properties.[2894] We do not believe that section 224(f)(1) mandates that a utility make space available on the roof of its corporate offices for the installation of a telecommunications carrier's transmission tower,[2895] although access of this nature might be mandated pursuant to a request for interconnection or for access to unbundled elements under section 251(c)(6).[2896] The intent of Congress in section 224(f) was to permit cable operators and telecommunications carriers to "piggyback" along distribution networks owned or controlled by utilities, as opposed to granting access to every piece of equipment or real property owned or controlled by the utility.[2897]

1186. The statute does not describe the specific type of telecommunications or cable equipment that may be attached when access to utility facilities is mandated.[2898] We do not believe that establishing an exhaustive list of such equipment is advisable or even possible. We presume that the size, weight, and other characteristics of attaching equipment have an impact on the utility's assessment of the factors determined by the statute to be pertinent -- capacity, safety, reliability, and engineering principles. The question of access should be decided based on those factors.

[2891] 47 U.S.C. § 224(f)(2).

[2892] AT&T comments at 14.

[2893] Ameritech reply at 8; NYNEX reply at 8; PacTel reply at 22.

[2894] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

[2895] *See* Winstar comments at 3.

[2896] *See supra*, Section VI.B.

[2897] Ohio Edison reply at 12.

[2898] "The term 'pole attachment' means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4).

3. Constitutional Takings

a. Background

1187. The access provisions of section 224(f) restrict the right of a utility to exclude third parties from its property and therefore may raise Fifth Amendment issues.[2899] While we have no jurisdiction to determine the constitutionality of a federal statute, constitutional concerns are relevant for purposes of construing a statute.[2900] For that reason, we here consider the constitutional issues raised in the comments.

b. Comments

1188. A number of utilities suggest that we must construe section 224(f) as permitting them to make the ultimate decision as to whether to grant access to their facilities and rights-of-way, on the grounds that a statute compelling them to grant access would be an unconstitutional taking of their private property under the Fifth Amendment.[2901] AEP notes that in *FCC v. Florida Power Corp*. the Supreme Court upheld the 1978 Pole Attachments Act, in part because nothing in that statute compelled utilities "to enter into, renew, or refrain from terminating pole attachment agreements."[2902] By contrast, the Supreme Court held that a state law requiring a landlord to permit a cable operator to install and maintain cable facilities over the landlord's apartment building constituted a taking of private property.[2903] On the basis of these cases, AEP contends: "To pass constitutional muster, the access required under section 224(f)(1) must be voluntary."[2904] Likewise, Puget argues: "If the Commission interprets the act's access requirement broadly as mandating access to the facility owner's property to all who desire it, the Takings Clause would be violated."[2905]

1189. Other utilities argue that the Fifth Amendment is implicated by the access requirements of section 224(f)(1), but stop short of contending that mandating access under the statue renders it

[2899] *See Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982).

[2900] *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

[2901] AEP comments at 7-10; Virginia Electric comments at 4; GTE comments at 23; Puget comments at 3; UTC comments at 4.

[2902] 480 U.S. 245, 251 n. 6 (1987).

[2903] *Loretto v. Teleprompter Manhattan CATV Corp*. 458 U.S. 419 (1982).

[2904] AEP comments at 7.

[2905] Puget comments at 3.

unconstitutional. U S West believes that any discussion of access under section 224(f)(1) "would be incomplete without explicit recognition of the fact that such mandatory occupation . . . constitutes the taking of private property. As such, both the Commission and respective state regulatory agencies must ensure that LECs receive just compensation for their taken property."[2906] Virginia Power believes that any mandatory access requirement would result in a taking of private property, and notes "the potential constitutional issue . . . ."[2907] UTC states that forced access "raises serious questions, regarding at least, the taking of property without just compensation."[2908] Finally, GTE suggests that mandatory access under section 224(f)(1) may be unconstitutional as a taking of private property without just compensation, when considered in conjunction with the method by which pole attachment rates will be determined under section 224(e)(2).[2909]

1190. Other commenters contend that there are no relevant constitutional issues to be confronted. Cole argues that requiring a utility to connect its facilities with those of other parties is simply a condition of providing utility service.[2910] With respect to LECs, for instance, Cole states: "Part of the obligation of being a regulated telecommunications common carrier is to provide services deemed to be necessary by regulators whether the regulated common carrier 'wants' to provide them or not."[2911] Cole contends that mandatory access to poles and other facilities "has no impact on the applicable constitutional standard."[2912] "As long as the rates for pole space and services are not confiscatory," Cole asserts,"there simply is no taking."[2913] In the alternative, Cole argues that "even if the access provision of section 224(f)(1) does constitute a taking, any argument that the compensation provided by the statute is not compensatory must be decided in a specific case, and not in this generic rulemaking."[2914]

c. Discussion

[2906] U S West comments at 16.

[2907] Virginia Power comments at 4.

[2908] UTC comments at 5.

[2909] GTE comments at 23 & n. 24.

[2910] Cole comments at 28.

[2911] *Id.* at 7.

[2912] *Id.* at 29.

[2913] *Id.* at 31 [*citing FPC v. Hope Natural Gas*, 320 U.S. 591, 602 (1944)].

[2914] *Id.* at 31 [*citing WBEN v. United States*, 396 F.2d 601, 618 (2d Cir.), *cert. denied*, 393 U.S. 914 (1968)].

1191. Section 224(f)(1) mandates that a utility grant access to a requesting telecommunications provider or cable system operator, subject to certain conditions that we discuss elsewhere in this Order. That provision is not reasonably susceptible of a reading that gives the pole owner the choice of whether to grant telecommunications carriers or cable television systems access. Even if such mandatory access results in a taking, we cannot agree that it necessarily raises a constitutional issue. The Fifth Amendment permits takings as long the property owner receives just compensation for the property taken.[2915]

1192. As for the amount of compensation provided under the statute, GTE suggests that mandatory access will result in an unconstitutional taking when considered in conjunction with the methodology for pole attachment rates set forth in section 224(e)(2). We, of course, have no power to declare any provision of the Communications Act unconstitutional.[2916] In any event, we cannot agree. Congress has provided for compensation to pole owners, in the event that they cannot resolve a dispute with telecommunications carriers regarding the charges for use of the owners' poles, that would allow them to recover the cost of providing usable space to each entity and two-thirds of the cost of the unusable space apportioned among such users. The Commission soon will initiate a separate rulemaking proceeding that will give greater content to this statutory standard. GTE and others may present their just compensation arguments with respect to the ratemaking standards the Commission adopts in that proceeding. GTE has not shown here, however, how the statutory standard contained in section 224(e) necessarily would deny pole owners just compensation.

4. Modifications

a. Background

1193. In the NPRM we sought comment on section 224(h) which provides:

> Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.[2917]

[2915] *Id.*

[2916] *See GTE California v. FCC*, 39 F.3d 940, 946 (9th Cir. 1994) (*citing Johnson v. Robison*, 415 U.S. 361, 368 (1974)).

[2917] 47 U.S.C. § 224(h).

1194. The NPRM requested comments addressing the manner and timing of the notice that must be provided to ensure a reasonable opportunity to add to or modify its attachment. In addition, we sought comment regarding the establishment of rules apportioning the cost of a modification among the various users of the modified facility. Finally, we requested comment on whether any payment of costs should be offset by the potential increase in revenues to the owner. If, for example, an owner modifies a pole to allow additional attachments that generate additional fees for the owner, should such revenues offset the share of modification costs borne by entities with preexisting access to the pole?

b. Comments

(1) Manner and Timing of Notice

1195. Several commenters state that no firm notice period should be established, due to the impracticalities of applying a single standard to the wide variety of situations that may necessitate modifications. Ameritech argues that the appropriate manner and timing for notice will vary according to local factors, such as the specific facility, the attachment, and the nature, extent and reason for the change.[2918] According to Ameritech, time frames for responding to circumstances will vary according to the reason for the modification, including modifications due to damage, deterioration, technological improvements, public works projects and demand growth. Given these variables, Ameritech contends that rigid notification rules could impair the facility owner's ability to respond to emergencies, and would unnecessarily complicate and delay expansion, improvement and maintenance of facilities.[2919]

1196. Most of the commenters agree that exceptions to any firm notice requirements should be made for emergency situations, such as storm restoration work, and minor modifications.[2920] Electric utilities argue that written notification requirements must not restrict their ability to respond to emergencies, customer complaints or routine maintenance.[2921] Incumbent LECs echo these suggestions.[2922] Duquesne urges an exception to any specific notice requirement where the utility's database does not show that the

[2918] Ameritech comments at 39.

[2919] *Id.; accord,* ConEd comments at 13; NU System Companies comments at 6.

[2920] Ameritech comments at 39; AT&T reply at 20; Bell Atlantic comments at 15; ConEd comments at 13-14; Delmarva comments at 23-24; Duquesne comments at 24-25; MFS comments at 12; NU System Companies comments at 6.

[2921] Public Service Company of New Mexico comments at 27; Virginia Electric comments at 19; Carolina Power reply at 2; American Electric Power reply at 41-43.

[2922] USTA comments at 10; Bell Atlantic comments at 15; SBC reply at 31-32.

attachment exists.[2923] Duquesne contends that telecommunications providers often make attachments without prior notice to the utility. Although the utility will discover the attachment when it goes to service the pole, Duquesne argues it should not have to suspend that service to give notice to a communications provider that attached without notice to the utility. As proposed by Duquesne, this exception would sunset in five years, by which time the utility would be required to have an accurate database.[2924]

1197. Those commenters who propose specific notice periods varied widely with regard to what they deem "reasonable" notice: periods of 10,[2925] 30,[2926] 60,[2927] 90,[2928] and 180[2929] days were recommended, with at least one commenter requesting a full year's notice before modifications could take place.[2930] In justifying the various notice periods and exceptions presented, commenters cite existing notification periods in standard contracts.[2931] They also express concerns that longer periods would interfere with a utility's ability to allocate work crews and schedule necessary outages efficiently,[2932] that upgrade schedules could be disrupted if a longer period were mandated,[2933] or that longer periods would be necessary to allow users to determine future business and economic needs.[2934] Teleport recommends that modifications which benefit only some users should not interrupt usage by others.[2935]

[2923] Duquesne comments at 25.

[2924] *Id.*

[2925] AT&T comments at 20; Delmarva comments at 23-24; Duquesne comments at 24.

[2926] PECO comments at 8. PECO also notes that a period exceeding 30 days may be appropriate in the case of particular rights-of-ways, such as ducts, which have special logistical difficulties and greater expenses associated with them. *Id.* at 9.

[2927] AT&T comments at 20, and AT&T reply at 20; GST Telecom comments at 7; U S West comments at 19.

[2928] Cole comments at 20; MFS comments at 11; Time Warner comments at 15.

[2929] MCI comments at 25.

[2930] Teleport comments at 10.

[2931] Cole comments at 20.

[2932] PECO comments at 8; USTA comments at 10, reply at 9.

[2933] PECO comments at 8.

[2934] Teleport comments at 10.

[2935] *Id.*

1198. A number of commenters express a preference for negotiated notification terms.[2936] For example, BellSouth currently negotiates contractual notice provisions with attaching communications providers and expresses concern that these contracts may have to be re-negotiated should rigid notice periods be established.[2937] BellSouth also has online notification programs, which it argues should be recognized as meeting any written notification obligations.[2938] Similarly, NEES points out that a group of New England utilities, local exchange carriers, and cable systems are developing a joint electronic information system for all construction-related notifications, and notes that specific notice requirements could reduce the effectiveness of such a system.[2939] Bell Atlantic argues that any duty of notice should be deemed waived when an attachment contract grants the utility modification power as needed.[2940]

(2) Allocation of Costs

1199. Several commenters argue that the circumstances surrounding modifications will vary so greatly that uniform application of a single cost allocation formula is infeasible.[2941] Others propose a variety of cost allocation formulas, including dividing the total cost of the modification by the number of entities modifying their attachments,[2942] tying an entity's share of modification costs to the share of space reserved on the pole for that entity's use,[2943] and applying a total service long-run incremental cost methodology based on proportionate space used by each carrier.[2944] One commenter suggests that costs of modifications should be shared only when the user requests the modification, in which case the user would pay a *pro rata* share of the cost.[2945]

[2936] *See, e.g.,* Bell Atlantic comments at 15; GTE comments at 27; Illinois Commission Comments at 72-73; NEES comments at 15-16; PacTel comments at 18; USTA reply at 9.

[2937] BellSouth comments at 17-18.

[2938] *Id.,* at 18 n.39.

[2939] NEES comments at 16.

[2940] Bell Atlantic comments at 15.

[2941] Ameritech comments at 39-40; GTE comments at 28; USTA comments at 11; U S West comments at 20.

[2942] Bell Atlantic comments at 16; Delmarva comments at 24-25; Duquesne comments at 26. Duquesne also contends that section 224(e)(1) dictates that any such rule should apply to a party's "proportionate costs" only if the parties are unable to resolve a dispute over such charges.*Id.*

[2943] AT&T comments at 21, reply at 22; MCI comments at 25; USTA comments at 11.

[2944] MCI comments at 24.

[2945] Teleport comments at 11.

1200. AT&T contends that, while the attacher should pay the cost of the addition, if the addition involves more capacity than is needed by existing users, then the owner should pay the balance, subject to recovery later when other entities seek attachments.[2946] According to AT&T, attachers should not pay the cost of modifications by owner, but should only pay their share of the costs to make the structure accessible.[2947] AT&T adds that owners should not be allowed to charge new attachers for modifications paid for by existing attachers.[2948] PECO argues that if the utility has decided to replace a 50-foot pole with a 55-foot pole, an attaching party should not be permitted to request a 60-foot pole unless the requesting party intended to make a modification necessitating the 60-foot pole within six months. According to PECO, the requesting party should be permitted to reserve space in this manner only if it was willing to cover maintenance, insurance, and other operational costs associated with the reserved space.[2949]

1201. Cole observes that an applicant must pay for the make-ready needed to accommodate its own attachments. This would include the cost to pre-existing users to transfer their lines to new locations on the pole, or to install a new pole if such a pole is necessary to accommodate the new attachment.[2950] Cole argues that the new user should be protected from having to pay for preexisting NESC violations that are corrected at the same time the new attachment is made.[2951] In addition, reading sections 224(h) and (i) together,[2952] Cole concludes that, if a change out is required to correct a pre-existing utility violation on the pole, the utility must bear the cost of the change out, and should also be solely responsible for change out costs if the change out is attributable solely to the needs of the utility, such as an increase in the load carried by the utility. Under this approach, if a change out is necessitated by something other than the needs of an entity that already has, or seeks to have, an attachment, then entities with existing attachments must be given an opportunity to maintain or modify their attachments, with each party bearing their own costs. As an example, all attaching parties would share the cost of a new pole that was needed due to a road widening project.[2953]

[2946] AT&T comments at 19.

[2947] *Id.*, at 21.

[2948] AT&T reply at 22.

[2949] *Id.*

[2950] Cole comments at 18.

[2951] *Id.; accord,* Summit comments at 1.

[2952] Note that section 224 (i) was not the subject of the *Notice.*

[2953] Cole comments at 19.

1202. A few commenters suggest that cost arrangements currently in place in certain states should be considered as possible solutions to this problem. For example, ConEd recommends adoption of the rule which it says is currently applied in New York and is an accepted practice: "If a utility causes an attachment to be modified within two years of an attachment, then the utility is responsible for the modification. (However, if it is the attaching entity, then the provider would be responsible for these costs.) Then, if a modification is made after two years, the provider is required to pay the costs of the modification."[2954] PacTel currently bills the attacher when it modifies a conduit to facilitate space for that attacher; if the modification is to benefit PacTel, PacTel picks up the whole cost. PacTel requests that this approach, which is currently used in California and Nevada, be recognized as a safe harbor under the 1996 Act.[2955] The NU System Companies contend that costs should be borne equally by all parties that have existing attachments on the facility, claiming that this method has generally been used among electric and telephone companies in its territories.[2956]

1203. Measuring modification costs poses a separate concern. Electric utilities, for example, contend that modification costs incurred to accommodate an attaching entity impose long-term costs beyond the initial cost of modification. Utilities have argued that the presence of attachments adds to the cost of maintaining and modifying the facility. One commenter suggests that modifications to increase pole height to accommodate attaching parties could impose on utilities additional costs of new trucks to service the pole.[2957] According to this commenter, unless attaching parties cover these added costs, utility owners will be subsidizing attaching parties on a continuous basis.[2958] At the same time, some commenters suggest that facility owners may engage in unnecessary or unduly burdensome modifications, imposing costs that could discourage new entrants from offering telecommunications services.[2959] Other commenters contend that normal market forces will prevent facility owners from making such modifications.[2960]

1204. Delmarva contends that it will be difficult, if not impossible, for the Commission to establish a rule that fairly defines what modifications are "unnecessary or unduly burdensome." Similarly, the NU System Companies argue that limitations on an owner's right to modify a facility and on "unnecessary or

[2954] ConEd comments at 14.

[2955] PacTel comments at 22.

[2956] NU System Companies comments at 6-7.

[2957] UTC comments at 18.

[2958] *Id.*; *see* Puget Sound comments at 5-6.

[2959] WinStar comments at 8; Teleport comments at 10; GST Telecom comments at 8; NCTA reply at 7-8.

[2960] *See, e.g.,* Bell Atlantic comments at 15, Public Service Company of New Mexico reply at 18-19.

unduly burdensome modifications" would potentially and directly interfere with crucial day-to-day utility operations. They further argues that applicable codes, state laws and company standards will generally dictate when and where modifications are needed, and it would be impractical to suggest a "limitation" or standard that could be applied in all cases.[2961] A number of commenters note that if a utility seeks to modify a facility and the attaching carrier will not benefit from the modification, the attaching entity bears none of the costs associated with the modification. Given the large costs associated with such arrangements, this allocation of rearrangement costs will preclude utilities from making any "unnecessary or unduly burdensome" modifications, according to these commenters.[2962]

1205. Some commenters supported,[2963] while many opposed,[2964] our proposal to require facility owners to offset modification costs with additional revenues from new attachments made possible by those modifications. Several of those opposed to offsetting note that pole owners modify out of necessity, not to attract additional attachers, and any additional revenues generated by the new capacity added through modifications would be speculative.[2965] One commenter notes that offsetting costs by potential additional revenues would be inconsistent with a scheme that allocates the cost of modifications only to those parties who benefit from such modifications.[2966] ConEd adds that the facility belongs to the utility and it therefore should be permitted to receive any revenues it can from the use of those facilities.[2967]

1206. Cole suggests that regular attachment fees paid over the term of a pole attachment agreement constitute a return on the utility's investment in the pole. Cole contends such fees should be minimal if parties with attachments have contributed to the cost of a new pole. "Otherwise," Cole states, "the utility will be recovering a return and other compensation for an investment which was made in part by its tenants."[2968] In such circumstances, Cole recommends that the ongoing rental fee should be limited to the incremental cost to the utility of the attachment.[2969]

[2961] NU System Companies comments at 7.

[2962] Delmarva comments at 26-27; *accord* Duquesne comments at 28.

[2963] AT&T comments at 21; GST Telecom comments at 9.

[2964] ConEd comments at 14; Delmarva comments at 25-26; Duquesne comments at 27; NEES comments at 16.

[2965] Bell Atlantic comments at 16; NU Systems comments at 7; NEES comments at 16; PECO comments at 10.

[2966] Duquesne comments at 27.

[2967] ConEd comments at 14.

[2968] Cole comments at 20.

[2969] *Id.*

c. Discussion

1207. We recognize that, when a modification is planned, parties with preexisting attachments to a pole or conduit need time to evaluate how the proposed modification affects their interest and whether activity related to the modification presents an opportunity to adjust the attachment in a desirable manner.[2970] At the same time, we also recognize that not all adjustments to utility facilities are alike. Some adjustments may be sufficiently routine or minor as to not create the type of opportunity that triggers the notice requirement.[2971] Indeed, it is possible that in some cases lengthy notice requirements could delay unnecessarily the kinds of modifications that would expedite the onset of meaningful competition in the provision of telecommunications services.[2972] Although the period of advance notice has varied widely among commenters, we note that 60 days has been advocated by several parties.[2973]

1208. Several commenters expressed a preference for negotiated notification terms.[2974] They have explained that circumstances will vary among owners of facilities.[2975] The time needed to commence a modification could vary according to pole conditions, technological improvements and demand growth.[2976] Attaching parties in rural markets may need more time to study facilities than facility users in urban markets.[2977] To demonstrate their ability to develop appropriate negotiated agreements, some commenters have described notice requirements in existing agreements. Such cases, they contend, illustrate that notification rules are unnecessary.[2978]

1209. We conclude that, absent a private agreement establishing notification procedures, written notification of a modification must be provided to parties holding attachments on the facility to be modified

[2970] Teleport comments at 10; AT&T reply at 20.

[2971] USTA comments at 10; Bell Atlantic comments at 15; MFS comments at 12; SBC reply at 33.

[2972] AT&T reply at 20; USTA reply at 9; U S West reply at 8; Massachusetts Electric, *et al.*, reply at 4-5.

[2973] *See, e.g.*, U S West comments at 19; AT&T comments at 20; GST Telecom comments at 7; AT&T reply at 20; Cincinnati Bell reply at 6.

[2974] GTE comments at 28; PacTel comments at 21-22; Rural Tel. Coalition comments at 16; American Electric Power reply at 40; Ohio Edison reply at 23.

[2975] American Electric Power comments at 46.

[2976] Ameritech comments at 39; Municipal Utilities reply at 6-7; Cincinnati Bell reply at 6.

[2977] GVNW comments at 11.

[2978] PacTel comments at 21-22; BellSouth comments at 17-18; American Electric Power reply at 40.

at least 60 days prior to the commencement of the physical modification itself. Notice should be sufficiently specific to apprise the recipient of the nature and scope of the planned modification. These notice requirements should provide small entities with sufficient time to evaluate the impact of or opportunities made possible by the proposed modifications on their interests and plan accordingly.[2979] If the contemplated modification involves an emergency situation for which advanced written notice would prove impractical, the notice requirement does not apply except that notice should be given as soon as reasonably practicable, which in some cases may be after the modification is completed. Further, we believe that the burden of requiring specific written notice of routine maintenance activities would not produce a commensurate benefit. Utilities and parties with attachments should exchange maintenance handbooks or other written descriptions of their standard maintenance practices.[2980] Changes to these practices should be made only upon 60 days written notice. Recognizing that the parties themselves are best able to determine the circumstances where notice would be reasonable and sufficient, as well as the types of modifications that should trigger notice obligations, we encourage the owner of a facility and parties with attachments to negotiate acceptable notification terms.

1210. Even with the adoption of a specific notice period, however, we still encourage communication among owners and attaching parties. Indeed, in cases where owners and users routinely share information about upgrades and modifications, agreements regarding notice periods and procedures are ancillary matters.[2981]

1211. With respect to the allocation of modification costs, we conclude that, to the extent the cost of a modification is incurred for the specific benefit of any particular party, the benefiting party will be obligated to assume the cost of the modification, or to bear its proportionate share of cost with all other attaching entities participating in the modification.[2982] If a user's modification affects the attachments of others who do not initiate or request the modification, such as the movement of other attachments as part of a primary modification, the modification cost will be covered by the initiating or requesting party.[2983] Where multiple parties join in the modification, each party's proportionate share of the total cost shall be based on the ratio of the amount of new space occupied by that party to the total amount of new space occupied by all of the parties joining in the modification. For example, a CAP's access request might require the

[2979] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

[2980] Although we do not offer a definition of "routine maintenance" in this proceeding, we anticipate that the parties to an attachment agreement will have established understandings in this regard. We do not believe that routine maintenance of a facility encompasses actions that would disrupt or impair the service of a facility user.

[2981] Frontier comments at 7.

[2982] NYNEX reply at 8; Carolina Power Reply comments at 3.

[2983] Cole comments at 18; MFS reply at 24.

installation of a new pole that is five feet taller than the old pole, even though the CAP needs only two feet of space. At the same time, a cable operator may claim one foot of the newly-created capacity. If these were the only parties participating in the modification, the CAP would pay two-thirds of the modification costs and the cable operator one-third.

1212. As a general approach, requiring that modification costs be paid only by entities for whose benefit the modification is made simplifies the modification process. For these purposes, however, if an entity uses a proposed modification as an opportunity to adjust its preexisting attachment, the "piggybacking" entity should share in the overall cost of the modification to reflect its contribution to the resulting structural change. A utility or other party that uses a modification as an opportunity to bring its facilities into compliance with applicable safety or other requirements will be deemed to be sharing in the modification and will be responsible for its share of the modification cost. This will discourage parties from postponing necessary repairs in an effort to avoid the associated costs.

1213. We recognize that limiting cost burdens to entities that initiate a modification, or piggyback on another's modification, may confer incidental benefits on other parties with preexisting attachments on the newly modified facility. Nevertheless, if a modification would not have occurred absent the action of the initiating party, the cost should not be borne by those that did not take advantage of the opportunity by modifying their own facilities. Indeed, the Conference Report accompanying the passage of the 1996 Act imposes cost sharing obligations on an entity "that takes advantage of such opportunity to modify its own attachments." This suggests that an attaching party, incidentally benefiting from a modification, but not initiating or affirmatively participating in one, should not be responsible for the resulting cost.[2984] As for pole owners themselves, the imposition of cost burdens for modifications they do not initiate could be particularly cumbersome if excess space created by modifications remained unused for extended periods.[2985]

1214. Apart from entities that initiate modifications and preexisting attachers that use the opportunity to modify their own attachments, some entities may seek to add new attachments to the modified facility after the modification is completed to avoid any obligation to share in the cost. If this occurs, the entity initiating and paying for the modification might pay the entire cost of expanding a facility's capacity only to see a new competitor take advantage of the additional capacity without sharing in the cost.[2986] Moreover, entities with preexisting attachments may, due to cost considerations, forgo the opportunity to adjust their attachment only to see a new entrant attach to a pole without sharing the modification cost. To protect the initiators of modifications from absorbing costs that should be shared by

[2984] GST Telecom comments at 8; MFS comments at 12; NCTA reply at 8.

[2985] Cincinnati Bell reply at 8.

[2986] *See* AT&T comments at 19.

others, we will allow the modifying party or parties to recover a proportionate share of the modification costs from parties that later are able to obtain access as a result of the modification. The proportionate share of the subsequent attacher should be reduced to take account of depreciation to the pole or other facility that has occurred since the modification. These provisions are intended to ensure that new entrants, especially small entities with limited resources, bear only their proportionate costs and are not forced to subsidize their later-entering competitors. To the extent small entities avail themselves of this cost-saving mechanism, however, they will incur certain record keeping obligations.[2987]

1215. Parties requesting or joining in a modification also will be responsible for resulting costs to maintain the facility on an ongoing basis. We believe determining the method by which to allocate such costs can best be resolved in the context of a proceeding addressing the determination of appropriate rates for pole attachments or other facility uses.[2988] We will postpone consideration of these issues until such time.

1216. We recognize that in some cases a facility modification will create excess capacity that eventually becomes a source of revenue for the facility owner, even though the owner did not share in the costs of the modification.[2989] We do not believe that this requires the owner to use those revenues to compensate the parties that did pay for the modification. Section 224(h) limits responsibility for modification costs to any party that "adds to or modifies its existing attachment after receiving notice" of a proposed modification.[2990] The statute does not give that party any interest in the pole or conduit other than access. Creating a right for that party to share in future revenues from the modification would be tantamount to bestowing an interest that the statute withholds.[2991] Requiring an owner to offset modification costs by the amount of future revenues emanating from the modification expands the category of responsible parties based on factors that Congress did not identify as relevant. Since Congress did not provide for an offset, we will not impose it ourselves. Indeed, a requirement that utilities pass additional attachment fees back to parties with preexisting attachments may be a disincentive to add new competitors to modified facilities, in direct contravention of the general intent of Congress.

5. Dispute Resolution

[2987] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

[2988] BellSouth comments at 18; NYNEX comments at 14; SBC comments at 18.

[2989] AT&T comments at 21; GST Telecom comments at 9; WinStar reply at 8-9.

[2990] 47 U.S.C. § 224(h).

[2991] American Electric Power reply at 46.

a. Background

1217. Implementation of the access requirements of sections 224 and 251(b)(4) require the adoption of enforcement procedures. In the NPRM, we sought comment on, among other things, whether to impose upon a utility the burden of justifying its denial of access to its poles, ducts, conduits, and rights-of-way due to lack of capacity, safety, reliability, and engineering issues.[2992]

b. Comments

1218. With respect to dispute resolution procedures generally, a few commenters note that existing complaint procedure mechanisms have worked well in the cable television pole context and should be adequate in this broader context as well.[2993] Other commenters argue that dispute resolution should be left to the states, with federal intervention only where the states failed to regulate.[2994] Some commenters request that any complaint mechanism established should provide for the expeditious resolution of disputes, with short time frames for responses and final resolution.[2995]

1219. Several commenters argue that, where access has been denied, the party denying access should have the burden of proving that such denial was justified.[2996] Others contend that, historically, cable operators have had the burden of proof in pole attachment cases, and that no principled basis exists for altering historic procedures.[2997] In addition, commenters expressed concern that placing the burden of proof on a utility unfairly presumes bad faith.[2998]

1220. PECO agrees with some cable commenters that the reasonableness of a denial of access should be based on industry safety and operational standards. A restriction on access imposed in accordance with such standards should be irrebuttably presumed reasonable, according to PECO. If the utility seeks to impose stricter standards, the burden would be on the utility to establish the reasonableness

[2992] NPRM at para. 223; *see* 47 U.S.C. § 224(f)(2).

[2993] *See, e.g.,* BellSouth reply at 16-17; GTE reply at 29-30; U S West reply at 8.

[2994] ICC comments at 72-73; Bell Atlantic reply at 10-11; GTE reply at 29-30; PacTel reply at 27.

[2995] *See, e.g.,* Joint Cable commenters at 20-22; NEXTLINK comments at 6-7.

[2996] Delmarva comments at 19; Duquesne comments at 22; Joint Cable commenters at 20-22; NEXTLINK comments at 6-7; OCC reply at 6; PUCO Staff comments at 11-12; Sprint reply at 20.

[2997] ConEd comments at 12; American Electric Power reply at 32-36; BellSouth reply at 16-17; SBC reply at 26-27.

[2998] GTE reply at 26-27; NEES comments at 14.

of the stricter standard. Predicting the likelihood of fact-intense disputes on such issues, PECO recommends the adoption of adequate dispute-resolution procedures.[2999] Similarly, Cole contends that a utility cannot deny a request for access based upon safety or reliability concerns as long as the applicant is willing to undertake the obligations necessary to comply with NESC standards.[3000] Safety and reliability standards that exceed NESC standards should be presumed unreasonable if they are used to deny access to a pole. The utility would then have the burden of showing the reasonableness of such standards.[3001]

1221. Duquesne argues that it is appropriate for the utility to bear the burden of establishing a threat to reliability if that rationale is used to deny access. Once a utility makes a showing, based on an engineering analysis, that the attachments "quantifiably threaten reliability," the burden would shift to the party seeking the attachment to show that the utility's analysis is incomplete or invalid, with the utility holding the ultimate burden of proof.[3002]

c. Discussion

(1) General Complaint Procedures Under Section 224

1222. Section 224(f)(2) provides that an electric utility may deny non-discriminatory access "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."[3003] We have determined that other utilities also may consider these concerns when faced with an access request.[3004] A denial of access, while proper in some cases, is an exception to the general mandate of section 224(f). We note that utilities contend that they are in the best position to determine when access should be denied, because they possess the information and expertise to make such decisions and because of the varied circumstances impacting these decisions.[3005] We think it appropriate that the utility bear the burden of justifying why its denial of access to a cable television or telecommunications

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[2999] PECO comments at 6.

[3000] Cole comments at 16.

[3001] *Id.,* at 17-18.

[3002] Duquesne comments at 22; *accord* Delmarva Comments at 19.

[3003] *See* 47 U.S.C. § 224(f)(2).

[3004] *See supra*, Section B(1)(c)(2).

[3005] *See generally* Comments of American Electric Power; Delmarva Power and Light; NEES; Puget Sound; Public Service Company of New Mexico; UTC; Virginia Power.

carrier fits within that exception.[3006] We therefore agree that utilities have the ultimate burden of proof in denial-of-access cases.[3007] We believe this will minimize uncertainty and reduce litigation and transaction costs, because new entrants generally, and small entities in particular, are unlikely to have access to the relevant information without cooperation from the utilities.[3008]

1223. We also agree with Virginia Power that a telecommunications carrier or cable television provider filing a complaint with the Commission must establish a prima facie case.[3009] A petitioner's complaint, in addition to showing that it is timely filed, must state the grounds given for the denial of access, the reasons those grounds are unjust or unreasonable, and the remedy sought. The complaint must be supported by the written request for access, the utility's response, and information supporting its position.[3010] The Commission will deny the petitioner's claim if a prima facie case is not established.[3011] A complaint will not be dismissed if a petitioner is unable to obtain a utility's written response, or if a petitioner is denied any other relevant information by the utility needed to establish a prima facie case. Thus, we expect a utility that receives a legitimate inquiry regarding access to its facilities or property to make its maps, plats, and other relevant data available for inspection and copying by the requesting party, subject to reasonable conditions to protect proprietary information.[3012] This provision eliminates the need for costly discovery in pursuing a claim of improper denial of access, allowing attaching parties, including small entities with limited resources, to seek redress of such denials.[3013]

1224. We agree with the Joint Cable Commenters that "time is of the essence."[3014] The Joint Cable Commenters contend that the Commission should implement an expedited review process for denial

[3006] Public Service Company of New Mexico at 20-23; Delmarva Power and Light at 19; Joint Cable commenters at 18; WinStar reply at 7; Sprint reply at 20.

[3007] Comments of Public Service Company of New Mexico at 20-23; Ohio Consumers' Counsel reply at 6; PUCO Staff comments at 12.

[3008] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

[3009] Virginia Power comments at 14; American Electric Power comments at 40-42; Carolina Power and Light comments at 5 (*citing* 47 C.F.R. § 1.1409(b)); *see also* SBC comments at 15-17.

[3010] Virginia Power comments at 15 (*citing* 47 C.F.R. § 1.1404(f) and (g)).

[3011] 47 C.F.R. § 1.1409(d).

[3012] AT&T comments at 19; GST comments at 6.

[3013] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601, et seq.

[3014] Joint Cable Commenters reply at 24.

of access cases.[3015] By implementing specific complaint procedures for denial of access cases, we seek to establish swift and specific enforcement procedures that will allow for competition where access can be provided.[3016] In order to provide a complete record, written requests for access must be provided to the utility. If access is not granted within 45 days of the request, the utility must confirm the denial in writing by the 45th day. Although these written requirements involve some recordkeeping obligations, which could impose a burden on small incumbent LECs and small entities, we believe that burden is outweighed by the benefits of certainty and expedient resolution of disputes which this procedure encourages.[3017] The denial must be specific, and include all relevant evidence or information supporting its denial. It must enumerate how the evidence relates to one of the reasons that access can be denied under section 224(f)(2), *i.e.*, lack of capacity, safety, reliability or engineering standards.

1225. For example, a utility may attempt to deny access because of lack of capacity on a 40-foot pole. We would expect a utility to provide the information demonstrating why there is no capacity. In addition, the utility should show why it declined to replace the pole with a 45-foot pole. Upon the receipt of a denial notice from the utility, the requesting party shall have 60 days to file its complaint with the Commission. We anticipate that by following this procedure the Commission will, upon receipt of a complaint, have all relevant information upon which to make its decision. The petition must be served pursuant to section 1.1404(b) of the Commission's rules.[3018] Final decisions relating to access will be resolved by the Commission expeditiously.[3019] Because we are using the expedited process described herein, we do not believe stays or other equitable relief will be granted in the absence of a specific showing, beyond the prima facie case, that such relief is warranted.

(2) Procedures Under Section 251

1226. A telecommunications carrier seeking access to the facilities or property of a LEC may invoke section 251(b)(4) in lieu of, or in addition to, section 244(f)(1). Because section 251(b)(4) mandates access "on rates terms, and conditions that are consistent with section 224," we believe that the

[3015] Joint Cable Commenters reply at 25.

[3016] Joint Cable Commenters reply at 24.

[3017] *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

[3018] 47 C.F.R. § 1.1404(b).

[3019] We note, however, that if the Commission requests additional information from any party, such party will have 5 days to respond to the request. Failure to provide the requested information within the 5 days, will result in a review of the record provided thus far.

section 224 complaint procedures established above should be available regardless of whether a telecommunications provider invokes section 224(f)(1) or section 251(b)(4), or both.

1227. If a telecommunications carrier seeks access to the facilities or property of an incumbent LEC, however, it shall have the option of invoking the procedures established by section 252 in lieu of filing a complaint under section 224. Section 252 governs procedures for the negotiation, arbitration, and approval of certain agreements between incumbent LECs and telecommunications carriers.[3020] In pertinent part, section 252(a)(1) provides:

> Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) or (c) of section 251.[3021]

1228. Where parties are unable to reach an agreement under this section, any party may petition the relevant state commission to arbitrate the open issues.[3022] In resolving the dispute, the state commission must ensure, among other things, that the ultimate resolution "meet[s] the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251 . . . . ."[3023] The Commission may assume the state's authority under section 252 if the state "fails to carry out its responsibility" under that section.[3024]

1229. Section 251(c)(1) creates an obligation on the part of an incumbent LEC "to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements . . . " to fulfill its section 251(b)(4) obligation.[3025] Therefore, a telecommunications carrier may seek access to the facilities or property of an incumbent LEC pursuant to section 251(b)(4) and trigger the negotiation and arbitration procedures of section 252. If a telecommunications carrier intends to invoke the section 252

[3020] 47 U.S.C. § 252. The requirements of section 252, and the conditions set forth in this section 3(a) of this Order, do not apply if the party seeking access is not a telecommunications carrier, or if the party receiving the request for access is not an incumbent LEC.

[3021] 47 U.S.C. § 251(a).

[3022] 47 U.S.C. § 252(b)(1).

[3023] 47 U.S.C. § 252(c)(1).

[3024] 47 U.S.C. § 252(e)(5).

[3025] 47 U.S.C. § 251(c)(1).

procedures, it should affirmatively state such intent in its formal request for access to the incumbent LEC. We impose this requirement because the two procedures have separate deadlines by which the parties may or must take certain steps, and therefore the incumbent LEC receiving the request has a need to know which procedure has been invoked. Section 224 shall be the default procedure that will apply if the telecommunications carrier fails to make an affirmative election.

1230. We note that section 252 does not impose any obligations on utilities other than incumbent LECs, and does not grant rights to entities that are not telecommunications providers. Therefore, section 252 may be invoked in lieu of section 224 only by a telecommunications carrier and only if it is seeking access to the facilities or property of an incumbent LEC.

1231. In addition, incumbent LECs cannot use section 251(b)(4) as a means of gaining access to the facilities or property of a LEC. A LEC's obligation under section 251(b)(4) is to afford access "on rates, terms, and conditions that are consistent with section 224." Section 224 does not prescribe rates, terms, or conditions governing access by an incumbent LEC to the facilities or rights-of-way of a competing LEC. Indeed, section 224 does not provide access rights to incumbent LECs. We cannot infer that section 251(b)(4) restores to an incumbent LEC access rights expressly withheld by section 224. We give deference to the specific denial of access under section 224 over the more general access provisions of section 251(b)(4). Accordingly, no incumbent LEC may seek access to the facilities or rights-of-way of a LEC or any utility under either section 224 or section 251(b)(4).

6. Reverse preemption

a. Background

1232. Even prior to enactment of the 1996 Act, section 224(b)(1) gave the Commission jurisdiction to "regulate the rates, terms, and conditions for pole attachments . . . ."[3026] Under former section 224(c)(1), that jurisdiction was preempted where a state regulated such matters. Such reverse preemption was conditioned upon the state following a certification procedure and meeting certain compliance requirements set forth in sections 224(c)(2) and (3). The 1996 Act expanded the Commission's jurisdiction to include not just rates, terms, and conditions, but also the authority to regulate non-discriminatory access to poles, ducts, conduits and rights-of-way under section 224(f).[3027] At the same time, the 1996 Act expanded the preemptive authority of states to match the expanded scope of the Commission's jurisdiction. section 224(c)(1) now provides:

[3026] 47 U.S.C. § 224(b)(1).

[3027] 47 U.S.C. § 224(f).

> Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f), for pole attachments in any case where such matters are regulated by the State.[3028]

b. Comments

1233. Cole contends that the nondiscriminatory access provisions of section 224 and our jurisdiction thereunder survive when a telecommunications provider seeks access to the facilities or property of a LEC under section 251(b)(4), even where such matters are regulated by a state.[3029] Cole notes that section 251(b)(4) requires LECs to afford access to its facilities and rights-of-way to competing telecommunications carriers "on rates, terms, and conditions that are consistent with section 224," with no reference to the possibility of state regulation.[3030] Cole further cites the competitive checklist of section 271 which requires an RBOC to provide such access "in accordance with the requirements of section 224," but which does not provide for state regulation of access.[3031] Cole argues that neither section 251 nor section 271 exempts a LEC or BOC from the access requirements of section 224 where the state has undertaken regulation of such matters. Cole argues that allowing states to preempt federal authority "would defeat the purpose of the Act to promote access" to local facilities.[3032]

1234. Similarly, Nextlink contends that the Commission's access requirements should apply to any LEC that receives an access request under section 251(b)(4), regardless of whether a state has attempted to assert jurisdiction under section 224(c).[3033] Nextlink describes section 251 as "an entirely separate section providing entirely different bases for Commission jurisdiction."[3034]

1235. Other commenters argue that a request for access under section 251(b)(4) always implicates section 224, including the provisions of section 224(c)(1) that allow the states to preempt federal

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[3028] 47 U.S.C. § 224(c)(1).

[3029] Cole reply at 26-27.

[3030] 47 U.S.C. § 251(b)(4); *see* Cole comments at 26-27.

[3031] 47 U.S.C. § 271(c)(2)(b)(iii); *see* Cole comments at 27.

[3032] Cole reply at 27.

[3033] Nextlink reply at 5.

[3034] *Id.*

regulation.[3035] The District of Columbia Commission argues that section 251(b)(4) only requires that access be given "'on rates, terms and conditions that are consistent with section 224.'"[3036] Thus, this commenter asserts that any federal regulation of access under section 251(b)(4) is subject to the state's authority under section 224(c)(1).[3037] Bell Atlantic agrees, arguing that the only obligation of section 251(b)(4) is to provide access consistent with section 224 and that providing access in accordance with a valid scheme of state access regulations meets this requirement, regardless of any federal access requirements that otherwise would apply.[3038] UTC states that "the statute clearly gives the states authority to establish access requirements if they elect to assert jurisdiction."[3039]

c. Discussion

1236. To resolve this issue, we will begin with access requests that can arise solely under section 224(f)(1). These circumstances include when a cable system or telecommunications carrier seeks access to the facilities or rights-of-way of a non-LEC utility. In such cases, the expansion of the Commission's authority to require utilities to provide nondiscriminatory access under section 224(f) is countered by a corresponding expansion in the scope of a state's authority under section 224(c)(1) to preempt federal requirements. The authority of a state under section 224(c)(1) to preempt federal regulation in these cases is clear.[3040]

1237. The issue becomes more complicated when a telecommunications carrier seeks access to LEC facilities or property under section 251(b)(4). By its express terms, section 251(b)(4) imposes upon LECs, "[t]he duty to afford access to the poles, ducts, conduits, and rights-of-way of such a carrier to competing providers of telecommunications services on rates, terms and conditions that are consistent with section 224."[3041] We believe

[3035] Ameritech comments at 33; NYNEX comments at 11-12; USTA reply at 7.

[3036] District of Columbia Commission comments at 9, *quoting* 47 U.S.C. § 251(b)(4).

[3037] *Id.*

[3038] Bell Atlantic comments at 12.

[3039] UTC reply at 29.

[3040] As in other circumstances, and subject to certain limitations, the Commission may preempt an otherwise valid state or local access requirement that "prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunication service." 47 U.S.C. § 253(a).

[3041] 47 U.S.C. § 254(b)(1)(4).

the reference in section 251(b)(4) to section 224 incorporates all aspects of the latter section, including the state preemption authority of section 224(c)(1). This interpretation is consistent not only with the plain meaning of the statute but with the overall application of sections 251 and 252.

1238. In the 1996 Act, Congress expanded section 224(c)(1) to reach access issues. Congress' clear grant of authority to the states to preempt federal regulation in these cases undercuts the suggestion that Congress sought to establish federal access regulations of universal applicability. Moreover, we do not find it significant that the access provisions of sections 251 and 271 contain no specific reference to the preemptive authority of states under section 224(c)(1), since both provisions expressly refer to section 224 generally.

1239. Thus, when a state has exercised its preemptive authority under section 224(c)(1), a LEC satisfies its duty under section 251(b)(4) to afford access by complying with the state's regulations. If a state has not exercised such preemptive authority, the LEC must comply with the federal rules. Similarly, when a telecommunications carrier seeks access rights from an incumbent LEC by choosing to avail itself of the negotiation and arbitration procedures established in section 252, a state that has exercised its preemption rights will apply its own set of regulations in the arbitration process pursuant to section 252 (c)(1). Finally, we note that state regulation in this area is subject to the provisions of section 253.

1240. We note that Congress did not amend sections 224(c)(2) to prescribe a certification procedure with respect to access (as distinct from the rates, terms, and conditions of access). Therefore, upon the filing of an access complaint with the Commission, the defending party or the state itself should come forward to apprise us whether the state is regulating such matters.[3042] If so, we shall dismiss the complaint without prejudice to it being brought in the appropriate state forum. A party seeking to show that a state regulates access issues should cite to state laws and regulations governing access and establishing a procedure for resolving access complaints in a state forum. Especially probative will be a requirement that the relevant state authority resolve an access complaint within a set period of time following the filing of the complaint.[3043]

C. IMPOSING ADDITIONAL OBLIGATIONS ON LECS

1. Background

[3042] Our rules require service of a pole attachment complaint on both the defending utility and the state. 47 C.F.R. § 1.1404(b).

[3043] *See* 47 U.S.C. § 224(c)(3) (establishing deadlines for states to take final action on complaints concerning the rates, terms, or conditions of access).

1241. Section 251(c) imposes obligations on incumbent LECs in addition to the obligations set forth in sections 251(a) and (b). It establishes obligations of incumbent LECs regarding: (1) good faith negotiation; (2) interconnection; (3) unbundling network elements; (4) resale; (5) providing notice of network changes; and (6) collocation.

1242. Section 251(h)(1) defines an incumbent LEC as a LEC within a particular service area that: (1) as of the enactment of the 1996 Act, provided telephone exchange service in such area; and (2) as of the enactment of the 1996 Act, was deemed to be a member of the exchange carrier association pursuant to 47 C.F.R. § 69.601(b) or, on or after the enactment of the 1996 Act, became a successor or assign of such carrier. Section 252(h)(2) provides that, "[t]he Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if (A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1); (B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and (C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section."[3044]

1243. In the NPRM, we sought comment on whether we should establish at this time standards and procedures by which interested parties could prove that a particular LEC should be treated as an incumbent LEC. We also sought comment on whether carriers that are not deemed to be incumbent LECs under section 251(h) may be required to comply with any or all of the obligations that apply to incumbent LECs, and whether states may impose on non-incumbent LECs the obligations that are imposed on incumbent LECs under section 251(c).[3045]

2. Comments

1244. Most parties that commented on the issue contend that the Commission should not establish in this proceeding standards and procedures for determining whether a LEC should be treated as an incumbent LEC.[3046]

1245. Many incumbent LECs and state commissions contend that it is not inconsistent with the Act for states to impose the requirements in section 251(c) on carriers that do not fall within the 1996 Act's definition of incumbent. These parties note that sections 251(d)(3), 252(e)(3), and 253(b) permit states to

[3044] 47 U.S.C. § 252(h)(2).

[3045] NPRM at paras. 44-45.

[3046] BellSouth comments at 10; NCTA comments at 15 n.46; Sprint comments at 10; Time Warner comments at 14; *contra* PacTel comments at 16.

impose additional requirements on carriers.[3047] State commissions allege that they are in the best position to determine when it is appropriate to impose particular obligations on new entrants.[3048] These parties contend that state imposition of reciprocal obligations would be equitable,[3049] and would help promote fair negotiation and realistic demands by the new entrants.[3050]

1246. Potential local competitors argue that states may not impose any of the requirements of section 251(c) on non-incumbent LECs.[3051] These parties contend that the 1996 Act specifically imposes different, and additional obligations on incumbent carriers.[3052] In addition, these parties contend that imposing the same regulatory obligations on non-incumbents is unnecessary because they lack market power,[3053] and is contrary to Congress's desire to facilitate new entry into the local telephone market.[3054] In addition, they assert that section 251(h)(2), which gives the FCC authority to determine when to treat additional carriers as incumbent LECs, would be meaningless if states could decide on their own to subject any LEC to obligations imposed by section 251(c) on incumbent LECs.[3055] Some parties assert that states

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[3047] *See, e.g.*, BellSouth comments at 10; California Commission comments at 12; Illinois Commission comments at 19-20 (it is not inconsistent with the Act for states to impose additional obligations on non-incumbents, although it would not be permissible for FCC to do so); Ohio Commission comments at 21-22; PacTel comments at 16; Pennsylvania Commission comments at 19.

[3048] *See, e.g.*, District of Columbia Commission comments at 14.

[3049] *See, e.g.*, Colorado Commission comments at 14-15; MECA comments at 18; Municipal Utilities comments at 10-12 (reciprocal obligations should be permitted as long as they are allowed under state law and city charter); Ohio Consumers' Counsel comments at 5-6 (the loop is a bottleneck regardless of whether the provider is an incumbent or a new entrant); Ohio Commission reply at 8.

[3050] *See, e.g.*, MCI comments at 16, 20; New Jersey Commission at 1.

[3051] *See, e.g.*, MCI comments at 5 n.7; MFS comments at 10; TCI comments at 14.

[3052] *See, e.g.*, ACTA comments at 5; Comcast comments at 17; Sprint comments at 10; Cox reply at 41; ICTA reply at 5.

[3053] *See, e.g.*, Comcast comments at 15-16; DoJ comments at 7 (absent a showing of market power, there is no basis for imposing additional obligations on new entrants); MCI comments at 5 n.7; Cox reply at 40; Time Warner reply at 11.

[3054] *See, e.g.*, Continental comments at 18; Metricom comments at 2 (imposing such requirements on non-dominant carriers would hinder competition); NEXTLINK comments at 15-16 (for states to impose additional obligations on non-incumbent LECs could constitute a barrier to entry in violation of section 253); Cox reply at 41; ICTA reply at 6 (imposing 251(c) requirements on new entrants would raise costs and thereby discourage potential competitors from entering the local market).

[3055] *See, e.g.*, GST comments at 3-4; MFS comments at 10; Time Warner comments at 15 (fact that Congress authorizes the FCC (but not state commissions) to impose incumbent obligations on the FCC suggests that Congress did not intend to give states that authority); TCI reply at 12; Teleport reply at 36.

already impose reciprocal obligations on new entrants, or require them to comply with requirements the 1996 Act only imposes on incumbent LECs.[3056]

3. Discussion

1247. We conclude that allowing states to impose on non-incumbent LECs obligations that the 1996 Act designates as "Additional Obligations on Incumbent Local Exchange Carriers," distinct from obligations on all LECs,[3057] would be inconsistent with the statute.[3058] Some parties assert that certain provisions of the 1996 Act, such as sections 252(e)(3) and 253(b), explicitly permit states to impose additional obligations. Such additional obligations, however, must be consistent with the language and purposes of the 1996 Act.

1248. Section 251(h)(2) sets forth a process by which the FCC may decide to treat LECs as incumbent LECs. Thus, when the conditions set forth in section 251(h)(2) are met, the 1996 Act contemplates that new entrants will be subject to the same obligations imposed on incumbents. While we find that states may not unilaterally impose on non-incumbent LECs obligations the 1996 Act expressly imposes only on incumbent LECs, we find that state commissions or other interested parties could ask the FCC to classify a carrier as an incumbent LEC pursuant to section 251(h)(2). At this time, we decline to adopt specific procedures or standards for determining whether a LEC should be treated as an incumbent LEC. Instead, we will permit interested parties to ask the FCC to issue an order declaring a particular LEC or a class or category of LECs to be treated as incumbent LECs. We expect to give particular consideration to filings from state commissions. We further anticipate that we will not impose incumbent LEC obligations on non-incumbent LECs absent a clear and convincing showing that the LEC occupies a position in the telephone exchange market comparable to the position held by an incumbent LEC, has substantially replaced an incumbent LEC, and that such treatment would serve the public interest, convenience, and necessity and the purposes of section 251.[3059]

[3056] TCI comments at 14 n.23; *see also* Colorado Commission comments at 11-12 (stating that it exempts new entrants from certain rules for a period of three years, after which the new entrant must demonstrate the continued need for such exemption); Illinois Commission comments at 19 (stating that it imposes intraLATA presubscription and line-side interconnection obligations on new entrants for policy reasons).

[3057] *Compare* 47 U.S.C. §§ 251(b) and 251(c).

[3058] We understand that some states may be imposing on non-incumbent LECs obligations set forth in section 251(c). *See, e.g.*, Colorado Commission comments at 11-12; Draft Decision, State of Connecticut Department of Public Utility Control, Docket No. 94-10-04 at 60, 65 (Connecticut Commission July 11, 1996); Illinois Commission comments at 19. We believe that these actions may be inconsistent with the 1996 Act.

[3059] 47 U.S.C. § 251(h)(2).